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Supreme Court, U.S.
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No. 00 1119

IN THE
SUPREME COURT OF THE UNITED STATES

WAYNE L. WHEAT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(I)

Whether a trial judge in an 846 drug conspiracy case abused his discretion when he granted a new trial where the government's case was marked by uncertainties, irreconcilable discrepancies, and inconsistencies, and in addition to being based on compound inferences, required "a leap of faith" to reach the conclusion that an isolated act of money laundering (involving the purchase of a car) proved the accused joined in, and participated in, a decade long drug conspiracy.

(II)

Under Rule 33, Rules of Criminal Procedure, the Judge is allowed to weigh the credibility of the witnesses, therefore it is his prerogative to grant a *Motion For A New Trial* because the government's evidence, albeit sufficient to sustain the verdict, preponderates sufficiently heavily against the verdict that a miscarriage of justice may have occurred.

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A trial judge in an 846 drug conspiracy case does not abuse his discretion when he grants a new trial where the government's case was marked by uncertainties, irreconcilable discrepancies, and inconsistencies, and in addition to being based on compound inferences, required "a leap of faith" to reach the conclusion that an isolated act of money laundering (involving the purchase of a car) proved the accused joined in, and participated in, a decade long drug conspiracy. 18

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Under Rule 33, Rules Of Criminal Procedure, the judge is allowed to weigh the credibility of the witnesses, therefore, it is his prerogative to grant a *Motion For A New Trial* because in his judgment the government's evidence, albeit sufficient to sustain the verdict, preponderates sufficiently heavily against the verdict that a miscarriage of justice may have occurred. 23

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Wayne L. Wheat, respectfully prays that a Writ Of Certiorari issue to review the judgment of the United States Court Of Appeals for the Sixth Circuit, which judgment, rendered on January 6, 2000, reversed the trial court's decision that granted petitioner a new trial under favor of Rule 33, Federal Rules of Criminal Procedure. That ruling became final on March 7, 2000 when the Court denied petitioner's *Motion For Rehearing En Banc*.

This Court extended the time for the seasonable filing of the Petition For Writ Of Certiorari until July 20, 2000.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court of Appeals, against which this *Petition* is directed, was issued on January 6, 2000, and is designated Appendix "A", pp. 1a - 9a, in the Appendix to this *Petition*. The District Court Opinion, which the Court of Appeals reversed, is designated Appendix "C", pp. 29a-73a.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Sixth Circuit Court of Appeals, as indicated above, was entered on January 6, 2000. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. 18 U.S.C., §846;
2. Rule 29, Federal Rules Of Criminal Procedure;
3. Rule 33, Federal Rules Of Criminal Procedure.

STATEMENT OF THE CASE

Wayne Wheat, the petitioner herein, was indicted along with his co-defendant at the trial, one Jackie Marzette (whose case is likewise pending before this Court and contains related issues), and seven others -- including Stuart "Bugs" Norman. Wayne Wheat was charged in Count 1 with violating Title 21 U.S.C., §856 (Drug Conspiracy). Count 9 charged him with Money Laundering, a charge dismissed post-trial on petitioner's Motion (Appendix "B", pp. 10a-28a). A third count, *i.e.*, Count 10, was dismissed on the defense Motion during trial.

The trial court, after denying Wheat's *Motion For Judgment Of Acquittal* on Count 1 (Appendix "C" *infra*, pp. 29a-73a), granted him a new trial. The Court reserved ruling on other segments of the Motion until certain documents, which had been suppressed by government's counsel, could be reviewed -- first *in camera* by the Court and later by the defense. The government seasonably lodged its appeal against the grant of a new trial and prevailed in the Court of Appeals.

The critical facts here are easily stated. Indeed, we rely on the trial Court's factual summary as set forth in its ruling which granted petitioner's *Motion For A New Trial*. Here it was said:

> . . . The evidence supports an inference that Wheat helped Marzette launder $50,000, in December, 1987. In addition, there was testimony that, in 1991, Wheat stored Stuart Norman's Ferrari Testarossa in the garage at his funeral home for a period of approximately one month, around and about the time that federal agents were seizing Stuart Norman's assets. Indeed, as is discussed above, there was evidence (sufficient to sustain a conviction) that, in connection with the purchase of that automobile in June, 1989, Wheat had helped Norman launder money in Florida, knowing that the money used in that transaction constituted the proceeds of drug transactions in which Norman had engaged. Also, there was evidence that Wheat notarized the signature of Michael Watson on a document by which the ownership of a 1964 Chevrolet El Camino was transferred. The fact that the type of vehicle involved in that transaction was a 1964 Chevrolet El Camino is of particular significance, because evidence was introduced that those vehicles were particularly suited to use in the drug trade. However, *there was no testimony directly tying Wheat to any transaction involving heroin or cocaine. Moreover, no witness testified that he or she delivered the proceeds of a drug transaction to Wheat.*

Appendix "C", pp. 43a - 45a. (Emphasis supplied.)

Here the facts also show that in granting the *Motion For A New Trial* (when arguably the Court should have, in

our judgment, acquitted petitioner), the Court posed the question before him as asking "whether the four incidents mentioned above ... [were] sufficient for a rational jury to have found the government proved beyond a reasonable doubt that Wheat [first of all] knew of the conspiracy, and that he knowingly and voluntarily joined it" (Appendix "C" p. 45a).

Also significant here, in specifically addressing Wheat's contention that his conviction on the drug conspiracy charge was based solely "upon proof that he [had assertedly] committed a separate and distinct offense that furthered the goals of the conspiracy" (Appendix "C", p. 46a, n.9), the Court noted the four isolatable instances set forth above, *ante, p. 2-3.*

The trial Court indicated that he fully recognized the standard to be applied under Rule 33 is "less strict" (*ibid*) than the standard he relied on in saying the evidence was sufficient to survive a Rule 29 Motion For Judgment Of Acquittal (*ibid*). Indeed the Court fully indicated he was "not required to construe the evidence in a manner most favorable to the government".

As the Court saw it, ultimately Wayne Wheat's "conviction rest upon two separate and distinct acts of money laundering, which occurred during the ten year life of the conspiracy". The Court further amplified his cogently compelling remarks on this precise point by telling us that:

> In reality, . . . [Wayne Wheat's] *conviction rests upon two separate and distinct acts of money laundering which occurred during the ten-year life of the conspiracy*. With respect to the money laundering incident which occurred

> in Florida in 1989, the testimony by Bulas[1] and Steven Lewis ("Lewis"), the two witnesses who identified Wheat as having been present during that transaction, was that his participation in the transaction was minimal. *For instance, Lewis testified that Wheat did not appear to be participating in the discussion relating to how the Ferrari Testarossa would be paid for.* *See* Doc. #573 at 9-10. In addition, Bulas testified that the gentleman accompanying Wheat (who Lewis identified as Stuart Norman) carried the money. *See* Doc. #572 at 153. While the testimony supports a finding that Wheat participated in an incident of money laundering, *it takes a leap of imagination to conclude from that testimony that he was aware of and joined a wide ranging, decade-long conspiracy to distribute cocaine and heroin. . . .*

Appendix "C", p. 48a.

If history repeats itself, government's counsel will again distort the impact of the Court's assessment of Wheat's alibi testimony. And he will again tell this Court, as was told

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[1] Bulas' identification of Wayne Wheat was not definite. Indeed, a close reading of the Record shows that when Bulas was asked if he saw the person identified by him as having been in Florida in the courtroom, he responded "I believe I do" (*ibid*). Having said that, the witness then asked if he "could add something" (*id.*, p. 120). The Court prevented the witness from adding anything (*ibid*).

to the Court below, that the June 15th date on the indictment was *only* an approximation of the date of the transaction.

Also significant here, after granting the new trial motion, the Court reserved ruling on that segment of the defense motion that contended the government wilfully suppressed evidence despite its obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny. Here it should be understood the Court did not consider whether certain evidence, said to be Brady material, should have been disclosed. Next, with reference to the statement made by one Del Pozo (the car salesman), who had previously sold Wayne Wheat a Jaguar "approximately one month before the transaction involving the Ferrari," the Court wrote:

> Of those in Florida who could have identified Wheat, Del Pozo observed him for the longest period of time. If he was able to identify Wheat as being present when the transaction involving the Ferrari occurred or if he said that Wheat was not present, that information would have been vital to Wheat's defense, which was based upon the proposition that he had not been in Florida in June, 1989. However, this Court has not had the opportunity to review a statement by or notes of an interview with Del Pozo . . . Accordingly, the Court orders the government to submit to the Court, for an in camera review, any statement or notes relating to Del Pozo. After that review, the Court will rule on this branch of Wheat's motion with finality.

Appendix "C", at pp. 53a-54a.

On this reserved issue, the Court later wrote (while the government's appeal in this case was pending) that:

> Wheat's conviction for money laundering (Count 9 of the Indictment) arose out of a June, 1989, transaction in which Norman purchased a Ferrari Testarossa from the Jaguar Collection in Coral Gables, Florida. *The government's theory was that Wheat accompanied Norman on that trip and assisted in that transaction.* That theory was supported with the identification testimony of Stephen Lewis and Luis Bulas. Wheat countered that evidence with an alibi defense. . . . Del Pozo was the salesman who sold that automobile to Norman. The exhibits, which the Court has reviewed, indicate that Del Pozo provided a description of the person who accompanied Norman to the Jaguar Collection in June, 1989, as 35 years old, tall, thin and possessing feminine characteristics. *One could argue that said description does not fit that of Wheat. Quite simply, such a description provided by a witness who had an opportunity to observe Norman and his companion could be exculpatory.*

Order of July, 1996. (Emphasis supplied.)

If nothing else the above quotes show the sheer intensity of the Court's views on the sufficiency of the evidence as he saw it in the wake of his responsibility to assay the evidence in dealing with the role assigned him by Rule 33, Federal Rules of Criminal Procedure.

At this point it should be noted that the Currency Transaction Report (CTR) submitted by Bulas (from the transaction quoted above) was the document that brought petitioner, Wayne Wheat, into this case. Counsel-opposite actually conceded that when Bulas originally submitted his CTR to the government it was in the name "Howard Donaldson," and the residence was given as that of the car agency. Counsel-opposite has also conceded this document was altered weeks later to include Wayne Wheat's name. This happened, as the government likewise conceded, *after* "Bulas was advised by the government that the CTR he had filed naming 'Howard Donaldson' was unacceptable". It was in the wake of this reality that Bulas obtained Wayne Wheat's driver's license, arguably from Del Pozo, with whom he shared his $14,000 fee (Bulas, Tr., Vol. 8, pp. 182-184).

Here it is undisputed that Del Pozo, who sold the car to a person he knew as "Donaldson," fully identify Stuart Norman as "Donaldson" and as the person to whom he sold (and ultimately delivered) the car. Del Pozo also identified Donaldson as the person who signed all the documents and as the person in whose name the car was titled. Also, it is a fact that the trial Judge isolated, as being significant, the sales manager Lewis' testimony that showed the person who accompanied Norman (in whose place Wayne Wheat was originally convicted of money laundering) *did not* participate in any of the discussions involving the transaction (Tr. Vol. 10,at pp. 8-10) and did not carry the money. (Also see Tr., Vol. 9, at p. 152-153.)

The point all this makes was really magnified by counsel-opposite's pathetic effort to tax our credulity by asking us to believe, and rely on, another of his oraculations. Indeed we have been told (as though it was a fact of significance) that "it is probable that neither Wheat nor

Norman expected Wheat's name to be listed on a CTR filed with the government, and Bulas did not initially do so". Now one looking at this Record objectively cannot avoid the conclusion that any argument that Wheat (despite his alibi) was in fact the purchaser is farfetched. To believe otherwise one must look past the testimony of Lewis and ignore the fact that Del Pozo (who knew Norman was also known as Donaldson) put the car in Donaldson's name because he really did not understand the transaction. Yet, this is obviously what the Court of Appeals did. It is also equally obvious the trial Court was unwilling to resort to such a farfetched reasoning pattern to salvage this conviction -- and refused to do so.

Stated another way, one would have to *invent* evidence to show that Wayne Wheat was present when the car was purchased and was present (on some previous occasion) when Lewis made it clear that *if* this car was paid for with cash, the purchaser's name would be placed on a CTR by the dealership. And evidence would likewise have to be conjured up to show that despite this Wayne Wheat nonetheless made his name available to Bulas for use in connection with the transaction. To believe this is what happened one must ignore the facts, as the Court of Appeals obviously did in this case.

Next, apart from petitioner's alibi evidence, which the trial Court regarded as plausible, it should not be overlooked that no witness attributes any statements, or even *a single* statement, that was made during these discussions to petitioner. It is also significant that Bulas himself categorically testified petitioner *did not* give him the money. Indeed, *Bulas testified without equivocation that "Howard Donaldson was represented to him to be the buyer of the car . . . throughout the transaction"* (Bulas, at Tr. Vol. 8, pp. 124-125). (Emphasis supplied.) This was said to be the

reason Bulas "provided the name 'Howard Donaldson' to the bank when the check was prepared" (*ibid*). Obviously it was for this same reason he put the name Donaldson on the original CTR, which was rejected, and led the agency to give Bulas petitioner's identification.

So postured, arguably petitioner's name could very well have come from the file the agency had which had been compiled in connection with petitioner's purchase some time earlier of a Jaguar -- a transaction that was likewise before the jury. This proof shows Lewis could have seen petitioner, Wayne Wheat, on the premises during that transaction.

What these facts show is that the government's central position (that Wheat's mere presence would alone be enough to prove he was a culpable participant, along with Bulas, Del Pozo, "Donaldson" and others, in an attempt to evade reporting the purchase of the car to the government) was not only unproven, it was likewise unfounded. Yet the government contended, and the Court of Appeals determined, this scenario is what proved Wheat was involved in the charged drug conspiracy -- which is also unfounded.

II

In the Court of Appeals the government placed significant emphasis on the following thesis extracted from its Brief:

> . . . the Ferrari was at Wheat's funeral home when federal agents interviewed Wheat regarding Stuart Norman. . . . Wheat did not disclose the location of the Ferrari to the investigators or admit any knowledge of the $216,000 cash in Florida."

Clearly the inference the government would have one draw was that the car was secreted by petitioner from those government agents. In addition to being a *non-sequitur*, if the suggestion is there was some sort of sinister relationship between the two, then the lack of any factual basis should be regarded as being dispositive. But more than that is involved here. For here we know the agents only learned about this car when they visited Florida in *July, 1991*, which was *after* they interviewed petitioner.

Our point becomes all the more believable once the Court realizes that if the agents had known about the car and had asked Wayne Wheat anything about this car (which had been purchased two years before, in 1989) *and* Wayne Wheat had denied any knowledge of its existence or of its whereabouts, then clearly he would not only have committed a crime in lying to these agents, he surely would have been impeached on this point. The fact that this did not happen should be deemed most significant.

III

If there is one thing that seems clear with reference to the government's reliance on evidence offered to show petitioner was present in Florida and was involved in the purchase of the Ferrari Testarossa, it is that there is no evidence petitioner was (as the government has contended) introduced to Bulas as the purchaser. Again, it is a fact that there is no evidence in this Record from Bulas (or anyone else) that the person in whose place Wayne Wheat was convicted uttered a single word to anyone or did anything -- including handling the money the government says was in the box. (See trial Court's quote, *ante*, p. 5.)

On the other hand, it should not be overlooked that the evidence showed it was only after "Bulas was advised by the government that the CTR he had filed naming Donaldson was "unacceptable" that he then revised the CTR naming Wayne Wheat. Indeed, Bulas testified:

* * *

Q. And you wrote down there [*i.e., on the first CTR*] the name of the person for whom the transaction was completed?

A. Yes, sir.

Q. And you wrote the name "Howard Donaldson," right?

A. Correct.

Q. And you wrote, over there under Social Security number, "Not Applicable"?

A. Not available.

Q. Not available. Now, is that what that means: not available?

A. That's what that means, sir, yes.

Q. *In other words, you tried to get that number from - -*

A. *- - the dealership.*

Q. *- - the dealership?*

A. *Correct.*

* * *

A. Correct. Correct. Yes, sir.

* * *

Q. What you sent them back was the name under Line 14, the name of "Howard Donaldson," . . .

A. Correct. In view of the fact that I did not have and they did not have the complete information to develop this section, I filled out the information on the dealership, itself, so that the Government would know that that is where the transaction happened and, if they needed any further information, they'd have to go through them to get it.

* * *

Q. Now, [when]ever this was, it was before July the 12th, wasn't it - -

* * *

A. . . . Yes, before July 12th.

Q. So, you knew the car had not been delivered - -

A. No.

Q. - - when you filled out the form?

A. . . . So, the decision to release the car is by the manager. . . .

* * *

Q. Okay. You did tell us, didn't you, that you looked in The Jaguar Collection's file of this transaction and that's where you got the name "Wayne Wheat"?. . .

* * *

THE WITNESS: *I personally did not review files.* I asked for information from the files [and] that was given to me by the salesman and the finance manager of that company.

BY MR. WILLIS:

Q. *And that's when they faxed you over a copy of Mr. Wheat's driver's license?*

A. *That's correct.*

* * *

Q. *You gave them the check on the 28th of June?*

A. *Correct.*

* * *

Q. Is it fair to say that when you were on the premises on the 28th, delivering that check, that you asked them to give you Mr. Donaldson's Social Security number?

A. No, I didn't ask for that.

* * *

Q. Yet, you mailed this off to the Government, I guess, the next day because you have 6/29 on it and *you wrote "Unavailable"; is that correct?*

A. *Correct.*

* * *

Q. Thank you. So, how, then, could you say the number was unavailable if you didn't even ask for it?

A. That's a good question. . . .

Bulas, at Tr., Vol. 8, pp. 154-164.

This evidence makes even more preposterous counsel-opposite's argument made to the Court of Appeals that "Norman and Wheat" gave Bulas $14,000 for his services and that "neither Wheat nor Norman" expected Wheat to be listed on a CTR. This absurdity becomes even more ludicrous since doubtless similarly specious reasoning was used by counsel in arguing that Wheat caused Bulas not to file the required CTR. Obviously then, the Court of Appeals in its consideration of these facts, either, ignored this farcical argument or failed to comprehend its flawed premises before crediting it -- as they did.

What makes most ridiculous the government's attempt to make petitioner the supplier of the funds, or even a person involved in the purchase of the Ferrari Testarossa, is readily exposed by Bulas' direct evidence which showed that when he was called into this deal, the price had previously been agreed on and they had already "[drawn] a contract . . . up. [And] [t]hey had [already paid] a deposit [that had been] noted on the contract." (Bulas, *id.*, pp. 127-128.) This was a clear cut reference to the $30,000 deposit that had been previously paid by Howard Donaldson. This is most significant since no one claims petitioner was in Florida more than once in connection with the purchase of the Ferrari.

At this point it is significant to note what the Court of Appeals determined were the facts in resolving the

government's appeal against Wayne Wheat. Here the Court wrote:

> It was further alleged that Wheat was involved in laundering money used by Bugs [Norman, aka Howard Donaldson] to purchase a Ferrari in Miami, Florida. Wheat was present *when Bugs and a dealership employee, Steven Lewis, discussed the necessity for the dealership to file a currency transaction report*[2] with the government if the automobile was purchased with cash. Luis Bulas, a financial middleman, was used to avoid the problem. Bulas was given $216,000 in cash. Thereafter, Bulas obtained a cashier's check for $202,000 and gave it to the dealership as the purchase price for the Ferrari.

Appendix "A", pp. 2a-3a.

What is significant about the above quote is that it can only be validated if there was proof petitioner was in Florida in connection with the purchase of this Ferrari on at least two (2) separate dates. This follows because the evidence showed that "when Steven Lewis discussed the necessity for the dealership to file a currency transaction report [CTR]," this occurred days before "Luis Bulas, a financial middleman[3]

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[2] One can infer Lewis' admonition about the CTR occurred when the down payment of $30,000 was made. This follows because it was sometime after the down payment was made that Bulas was contacted.

[3] Bulas' evidence shows he was contacted days later and it was still later when he came to the dealership, saw the person he

was [brought into the picture] and used" according to the Court, "to avoid the problem" (*ibid*).

The point here being that while the District Court did not specifically note these glaringly irreconcilable segments of the evidence in his determination a new trial was warranted, this failure does not provide a reason why this evidence should have been ignored by the Court of Appeals or should be ignored by this Court.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The arguments made below all point to the fact that the trial Court acted, as he was empowered to do, "in the interest of justice". Indeed, the trial Court concluded that the evidence offered to prove petitioner's involvement in a drug conspiracy was not only weak, actually it was non-existent.

Proof this is so will be further verified by the government's failure to point to any specific excerpt of testimony that shows petitioner ever did or said anything that even slightly showed he was ever aware of Stuart Norman's drug dealings. And, just as surely, there will be nothing offered to show petitioner agreed, directly or indirectly, to be a part of any drug conspiracy.

The trial court heard the evidence; hence, given his prerogatives in dealing with the issues as they were postured for him, his conclusion a new trial was warranted "in the interest of justice" was really just.

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identified [if he did] as Wayne Wheat and received the money. (*Id.*, pp. 118-119.)

ARGUMENT NO. I

A TRIAL JUDGE IN AN 846 DRUG CONSPIRACY CASE DOES NOT ABUSE HIS DISCRETION WHEN HE GRANTS A NEW TRIAL WHERE THE GOVERNMENT'S CASE WAS MARKED BY UNCERTAINTIES, IRRECONCILABLE DISCREPANCIES, AND INCONSISTENCIES, AND IN ADDITION TO BEING BASED ON COMPOUND INFERENCES, REQUIRED "A LEAP OF FAITH" TO REACH THE CONCLUSION THAT AN ISOLATED ACT OF MONEY LAUNDERING (INVOLVING THE PURCHASE OF A CAR) PROVED THE ACCUSED JOINED IN, AND PARTICIPATED IN, A DECADE LONG DRUG CONSPIRACY.

Of critical significance here is the fact that despite evidence designed to show, hence considered by the jury, that petitioner committed (as charged in Count 10) a tax reporting violation, he was acquitted of this charge at the close of the government's case.

The effect of the evidence bearing on this failed charge *and* the evidence on count 9, on which petitioner likewise prevailed, is most significant. See Appendix "B", pp. 10a, et. seq. This follows because these charges formed the sole basis for the government's theory that petitioner was involved in the charged drug conspiracy. In our judgment, the evidence bearing on the dismissed charges (*i.e.*, Counts 9 and 10) cannot be regarded as being as clear-cut as counsel-opposite must argue. Indeed, it is true, as the government has argued, the jury did convict petitioner on count 9, the money laundering count. But again, the trial court granted an acquittal on that count. It is also true that the government was shown to have suppressed considerable evidence that bore on

the issue as to whether petitioner was in Florida on the date of the alleged money laundering transaction. Petitioner's evidence showed that at the time the government claimed he was in Florida, petitioner was presiding at a funeral that was orchestrated by him through his funeral home in Dayton. So postured, the jury's verdict on this point became even more suspect. This is particularly so since once the government learned of petitioner's alibi, they then argued the crime was committed *on or about* the date alleged in the indictment.

Thus to argue, as the Court Of Appeals inferentially did, that Wayne Wheat was present in Florida when Stuart Norman was told by "Stephen Lewis about the necessity for the dealership to file a currency report with the government" and again was there when Luis Bulas, said to be the "financial 'middleman'" (Appendix "A",pp. 2a-3a), was later delivered the money, is clearly a gross distortion of the Record. This also follows because it ignores the fact that the salesman involved in this transaction, who personally knew petitioner, described another and indisputably different person (as the District Court noted) as being present with Stuart Norman when the car was purchased (Appendix "C", p. 53a).

The point here being, the insistence by counsel-opposite and the Court of Appeals that petitioner was involved in this transaction (particularly in light of the disclosures the government was *required* to make, despite their vigorous objections)[4] is a bit disingenuous. On the other hand, even

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[4] *See* R. 726, *Order* dated 7/26/96; R. 732, *Memorandum In Support*, dated 8/27/96; R. 735, *Memorandum In Support*, dated 9/10/96; R. 736, *Reply*, dated 9/13/96; R. 769, *Order*, dated 2/20/98; R. 770, *Minutes of Oral Hearing*, dated 2/24/98; R. 772, *Post-Hearing Brief*, dated 3/2/98; R.

assuming petitioner was in Florida, the most that can be said is that he was present. Indeed, *as the trial Court noted several times, no witness credited petitioner with saying anything or doing anything*. Additionally, there was no real showing the funds involved in this transaction were drug proceeds. Further, even less of a showing was made that petitioner knew anything about the source of the funds. Thus, as the trial Court concluded, it does require "a leap of faith" to believe that petitioner's presence alone would show beyond a reasonable doubt that he was privy to the source of the funds, or that petitioner played an integral part in a drug conspiracy with the purchaser of the automobile.

The Ferrari Testarossa, was purchased in *June, 1989*. And, indeed, it was stored in petitioner's garage for "several weeks" in *June, 1991* (or thereabouts). Yet, despite this being so, this event does not justify any negative inference. This is so because it is doubtful the agents knew anything about this car when they visited petitioner. Thus it is understandable why the government has not made any attempt to demonstrate they were aware of the car's existence -- no such proof exists.

The upshot of all this is that given the complete absence of any testimony, by any witness, that petitioner said or did anything in connection with the purchase of the Ferrari Testarossa, it could not be any clearer the trial Court's findings were based on evidence which included proof that the money used to purchase that car was provided by Stuart Norman, who was positively identified as the person who signed all of the documents relative to the transaction. Norman was likewise identified as the person who provided

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773, *Decision*, dated 3/5/98.

the original down payment of $30,000 [as shown by Exhibit "8.8"]), which was so recorded in papers seen by Bulas when he inspected the deal.

Given the further fact that, as the trial Judge repeatedly said, no witness (not even one) involved petitioner in any way in any type of drug activity with Stuart Norman or anyone else, one really does have to be a prosecutor, or at least be prosecution-oriented, to see this proof as being sufficient to make petitioner a member of the charged drug conspiracy.

With all this being so, it becomes compellingly clear that in this case the trial Court's decision granting a new trial makes all the sense in the world.

In anticipation of the argument the government will again make (*i.e.*, that newly discovered evidence or a finding of trial error is required before the trial Court can grant a new trial "in the interest of justice" and for the reasons articulated by the Court) it should suffice to note that none of the cases previously cited by the government in support of this thesis make that point. Indeed, the reliance on *United States v. Ashworth*, 836 F.2d 260 (6th Cir. 1988), is clearly misplaced. For it does not require any such showing. As we see it, the Sixth Circuit's reliance in *Ashworth* on *United States v. Turner*, 490 F. Supp. 583 (E.D. Mich., 1979), makes it clear that there is no requirement for newly discovered evidence, or even a finding that error occurred. The Court in *Ashworth* actually endorsed *Turner* as setting forth the correct standard. Specifically, the Sixth Circuit had previously endorsed the following quote from *Turner*:

> A Motion for Acquittal and Motion for New Trial based on the ground that the verdict is

> against the great weight of the evidence are governed by very different standards. The Motion for New Trial involves a much broader standard of review than a Motion for Acquittal. A verdict may well be against the great weight of the evidence, but, nevertheless, be substantial enough to permit reasonable jurors to draw an inference of guilt. In a Motion for New Trial, the trial judge can consider the credibility of the witnesses and the weight of the evidence to insure that there is not a miscarriage of justice. It has often been said that he/she sits as a thirteenth juror.
>
> Nevertheless, granting a Fed.R.Crim.P. 33 Motion for New Trial attacking the weight of the evidence is a discretionary matter. The Court should exercise such discretion only in the extraordinary circumstances where the evidence preponderates heavily against the verdict.

United States v. Ashworth, 836 F.2d, at 266.

Next, in ruling against the District Court's conclusion (that the jury's verdict could not withstand the weighing and assaying the Court was required to make by virtue of Rule 33, Federal Rules of Criminal Procedure) the Court of Appeals has ignored certain indisputable facts. These include the irrepressible fact that no witness (absolutely none) testified petitioner was involved in anyway in any drug activity. And, no witness attributed any role to him, beyond his asserted presence when the Ferrari transaction occurred. With this being so, to convict petitioner of the charged drug conspiracy, the jury could only have relied on the flimsiest of evidence.

And, they had to do this in spite of what was said by the Court to be "a plausible alibi" for the date the indictment charged and the Records showed the charged "money laundering" took place in Florida.

Also it should be noted that there is nothing in any of the various remarks made by the trial Judge in connection with his grant of the new trial that shows he was not keenly aware of the full ambit of his powers under Rule 33, Federal Rules Of Criminal Procedure. Indeed, it seems counsel-opposite and the Court of Appeals truly failed to comprehend that Rule 33 allows for the grant of a new trial "in the interest of justice". This is particularly so where, as here, the verdict is contrary to the weight of the evidence and where to do otherwise could allow a miscarriage of justice to occur.

The bottom line here is, there was nothing shown in the evidence that would infer petitioner was a drug conspirator.

ARGUMENT NO. II

UNDER RULE 33, RULES OF CRIMINAL PROCEDURE, THE JUDGE IS ALLOWED TO WEIGH THE CREDIBILITY OF THE WITNESSES, THEREFORE, IT IS HIS PREROGATIVE TO GRANT A *MOTION FOR A NEW TRIAL* BECAUSE IN HIS JUDGMENT THE GOVERNMENT'S EVIDENCE, ALBEIT SUFFICIENT TO SUSTAIN THE VERDICT, PREPONDERATES SUFFICIENTLY HEAVILY AGAINST THE VERDICT THAT A MISCARRIAGE OF JUSTICE MAY HAVE OCCURRED.

This case vindicates, at least for some of us, the efficacy of an observation made more than fifty (50) years ago

by a sage from a bygone, but enlightened era. Indeed it was Justice Jackson who once warned that the wholesale use of the conspiracy concept "constitutes a threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U.S.440 at 446 (1949). As the wise and revered Justice saw it (even then), the history of the law of conspiracy "exemplifies the tendency of a principle to expand itself to the limits of its logic" (id., at p. 449). (Citing Cardoza, *The Nature Of The Judicial Process*, at p. 51.)

The fears and beliefs of the late Justice Jackson become even more alarming when it is realized that if the position taken by the Sixth Circuit, in its Opinion below, is validated, no longer will it be feasible for trial judges in federal criminal trials (at least in the Sixth Circuit) to view Rule 33, Federal Rules of Criminal Procedure as empowering them to grant a new trial "in the interest of justice" even when convinced otherwise a miscarriage of justice would result. *Cf., O'Neal v. McAninich*, 513 U.S.432(1995).

Given *McAninich*, it would surely be (as we see it) somewhat ironic that a Habeas Judge is empowered to grant a new trial if he has "grave doubts" as to whether a constitutional error influenced the outcome in a state jury trial; yet if this same judge (in a case tried by him) reaches the conclusion that "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred," he is powerless to act. (Quoting from *United States v. Lincoln*, 630 F.2d 1313,at 1319 [8th Cir. 1980].)

As shown above the government's evidence was designed to show Wayne Wheat (our petitioner) was present in Florida when Stuart Norman was said to have been accompanied by Wheat and another person (who carried the

money) and gave to a financial middleman $216,000 in cash. This money covered the balance due in connection with the purchase of a Ferrari Testarossa from the dealership. Again, no witness testified petitioner said or did anything in connection with this transaction, and petitioner offered alibi proof, which the trial court determined was plausible. This alibi indisputably that put petitioner in Ohio on the date alleged in the indictment.

The government's response to the alibi testimony was to ultimately argue the date was "on or about" and it was possible for petitioner to have traveled to Florida and still returned to Ohio on the dates covered by his alibi.

While all that is bad enough, the trial court also had before him, with reference to the identification testimony, not only the witness Bulas' less than specific identification of petitioner, but other evidence which showed Bulas obviously saw the person referred to by him on a different day than did Steven Lewis, the other witness who identified petitioner. Lewis testified petitioner was present at the dealership when he told the salesman and Stuart Norman, the purchaser, if cash was paid for the car a CTR would have to be filed with the government.

Proof the Lewis encounter had to have occurred on a different date is his testimony that it was days later when he (Bulas, the financial middleman) was sought out and even days after that when he was present at the dealership and the money was produced. Bulas' evidence is punctuated by the fact that when asked if Steven Lewis was present, Bulas responded by saying he believed Lewis was in his office in a different part of the building (Bulas, Vol. 8, p. 153) and he did not recall Lewis being present at anytime during the consummation of his business with these people (*ibid*).

Also, it must be further understood the trial Court, with reference to the witness Steven Lewis, was aware counsel for the government conceded that when first shown a photograph of Wayne Wheat, Lewis was unable to identify him (Tr., Vol. 9, pp. 39 & 70). He only developed an ability to do so after he was approached again following the trial of Stuart Norman, a severed co-defendant (*id.*, pp. 38-39).

The upshot of the point made is that these two witnesses provided the sole proof petitioner was in Florida. Yet, neither of these witnesses credited petitioner with saying or doing anything related to the transaction involving the Ferrari. With all this being so, one must wonder how Wayne Wheat got convicted.

CONCLUSION

What is most disturbing to this counsel, and doubtless should disturb this Court, is the persistent indication, both, directly and by pure insinuation, that it was Stuart Norman and Wayne Wheat who gave the money involved in the purchase of the Ferrari Testarosa to Bulas. Aside from the obvious significance of the failure of the government to demonstrate what evidence they relied on for that statement, we have what clearly is the fact - - no witness, including Bulas, testified that Wheat gave anyone, including Bulas, any money. (See Tr., Vol. 8, pp. 136, 138 and 153.) The most that can be said is Wheat was present - - and Wheat provided an alibi defense to show this was not so.

Thus it could not be any clearer than it was for the trial Court that the government's proof did not reach that degree of probative force that one would expect in what is submitted as proof beyond a reasonable doubt. Clearly then,

in light of the fact that the evidence bearing on petitioner's conviction for money laundering was insufficient, that same evidence may nonetheless have contributed to petitioner's conviction on the drug conspiracy charge. Thus, it follows that undeniably the decision of the trial Court should not have been reversed by the Court of Appeals, as it was, on the grounds that he abused his discretion.

Respectfully submitted,

/s/_____
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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed January 6, 2000]

Nos. 96-3207 and 98-3391

United States of America *Plaintiff-Appellant*,	)
v.	)
Wayne L. Wheat, *Defendant-Appellee*.	)
United States of America, *Plaintiff-Appellee*,	)
v.	)
Jacquelyn Marzette, *Defendant-Appellant*.	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO

Before: KRUPANSKY, NELSON, and SILER Circuit Judges.

SILER, Circuit Judge. Defendants Wayne L. Wheat and Jacquelyn Marzette were tried together and convicted on charges of money laundering and conspiring to distribute cocaine. Marzette appealed her conviction. The district court denied Wheat's motion for a new trial on the money laundering charge, but granted him a new trial on the drug conspiracy charge. The government appealed the order granting Wheat a new trial. For the reasons discussed below, we AFFIRM Marzette's conviction and REVERSE the grant of a new trial to Wheat.

FACTS PERTAINING TO WHEAT

The case involved a long-term drug trafficking conspiracy in the Dayton, Ohio, area headed by Stuart "Bugs" Norman, a friend of Wheat and Marzette. It was alleged that Wheat laundered money for Bugs and Marzette. In 1987, Wheat withdrew $50,000 from his bank account, obtained a cashier's check in that amount, and gave it to Marzette. Wheat claimed the money he gave to Marzette was a loan. However, he acknowledged that he never asked Marzette to pay back the money.

It was further alleged that Wheat was involved in laundering money used by Bugs to purchase a Ferrari in Miami, Florida. Wheat was present when Bugs and a dealership employee, Steven Lewis, discussed the necessity for the dealership to file a currency transaction report with the government if the automobile was purchased with cash. Luis Bulas, a financial middleman, was used to avoid the problem.

Bulas was given $216,000 in cash. Thereafter, Bulas obtained a cashier's check for $202,000 and gave it to the dealership as the purchase price for the Ferrari. After the purchase, Bugs brought the Ferrari to Dayton where he stored it in Wheat's funeral home garage for several weeks.

FACTS PERTAINING TO MARZETTE

The government presented the drug conspiracy through three primary witnesses: Herk Norman (Bugs' nephew), Roger Kendall, and Michael Watson. At trial, the government revealed a single interview with Kendall. However, other interviews took place. The district court required the government to provide Marzette with additional statements made by Kendall to the government. Both Kendall and federal agents denied that Kendall was interviewed by the government prior to a 1994 interview, but subsequent proof shows otherwise.

The government introduced Marzette's tax returns as evidence to show that there was "no legitimate income." The court denied Marzette's request to instruct the jury that Marzette could treat money received from lovers as gifts as long as the money was not "specific payments for specific sessions of sex."

DISCUSSION

NEW TRIAL FOR WHEAT

A district court's decision to grant or deny a new trial is reviewed under an abuse of discretion standard. *United States v. Ashworth,* 836 F.2d 260, 266 (6th Cir. 1988). In

reviewing a trial court's decision to grant a new trial this court must "closely scrutinize" the trial court's justifications because of the required deference to the factual determinations of the jury. *Holmes v. City of Massillon,* 78 F.3d 1041, 1047 (6th Cir. 1996). A jury's verdict should not be overturned as being against the weight of the evidence unless the verdict was unreasonable. *Id*

The district court abused its discretion when it granted a new trial, because the evidence reasonably supported the jury's factual determination. The district court properly ruled that the evidence was sufficient to support Wheat's conviction on the money laundering charge. However, it stated that although the testimony supported a finding that Wheat participated in money laundering, "it takes a leap of imagination to conclude from that testimony that he was aware of and joined a wide ranging, decade-long conspiracy to distribute cocaine." The district court failed to recognize that a "leap of imagination" is not necessary to show Wheat was involved in the drug conspiracy.

The government was not required to show Wheat had knowledge of a "wide ranging decade-long" drug trafficking conspiracy. A jury may infer from money laundering activities that there is a conspiracy to violate drug laws because "money laundering is an integral part of a drug enterprise." *United States v. Avery,* 128 F.3d 966, 971 (6th Cir. 1997). The evidence did not show Wheat's awareness of the duration or details of the drug activity, but such proof is not required. The district court erred in granting Wheat a new trial on his conspiracy conviction.

DISCLOSURE OF INTERVIEWS

The rule from *Brady v. Maryland,* 373 U.S. 83 (1963), is that the government is obligated to turn over evidence that is favorable to the accused and material to guilt or punishment. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding, would have been different." *Kyles v. Whitley,* 514 U.S. 419, 434 (1995). In 1988, Kendall was interviewed by FBI Special Agent Robert Brawner. In 1992, Kendall was interviewed by IRS Agent Dennis Hall and Agent Brawner. Marzette claims the pre-1994 interviews were not properly disclosed to her. She contends that she should receive a new trial because the *Brady* rule was violated.

The pre-1994 interviews contain no inconsistencies. The only difference is that in the first two interviews Kendall did not mention the drug deal between himself and Marzette. The pre-1994 interviews were not material. Furthermore, as the district court noted, Kendall was impeached extensively through cross examination at the trial. Therefore, it is unlikely that one more possible impeaching fact would have caused the jury to render a different verdict.

There was no reasonable probability that disclosure would have changed the outcome of the trial. Furthermore, the *Brady* rule was not violated because Marzette's counsel knew of the prior interviews between Kendall and government agents. Hall testified before the grand jury stating that Kendall was "interviewed on several occasions by myself and special agents of the Federal Bureau of Investigation." Marzette's counsel acknowledged that he had access to Hall's

grand jury testimony. Therefore, there was no "undisclosed" information.

LIMITATION ON CROSS EXAMINATION

The decision to limit cross examination is reviewed for abuse of discretion. *United States v. Faymore,* 736 F.2d 328, 334 (6th Cir. 1986). A trial judge retains wide latitude to impose reasonable limits on cross examination of prosecution witnesses based on concerns about prejudice, among other things. *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986).

The evidence in question that Marzette sought to introduce was a judicial finding of perjury from Herk's 1986 sentencing. Marzette was allowed to question Herk on his testimony at the 1986 trial. In response, Herk admitted that he had lied at that trial. However, the district court did not allow Marzette to introduce the judge's comments from the 1986 proceeding. The court was justifiably concerned that the "judicial language" from the 1986 trial might "take the issue from the jury." The presentation of the judicial finding could strongly influence the jury, to disbelieve Herk's testimony in Marzette's trial. There was clearly a danger of substantial prejudice which outweighed the probative value. Therefore, the district court did not abuse its discretion in denying the admission of the court's comments.

JURY INSTRUCTIONS

Jury instructions will be reviewed to determine whether the charge fairly and adequately submitted the issue and law to the jury *United Stales v. Chesney,* 86 F.3d 564, 573 (6th Cir. 1996). This court will reverse a conviction for

failure to give requested jury instructions when the requested instruction is a correct statement of the law, not substantially covered by other instructions given, and failure to give the instruction would impair the defendant's theory of the case. *Id.*

The requested instruction was substantially covered by the instructions that were delivered. Furthermore, Marzette did not contend that the instructions given were not a correct statement of the law. Finally, the instructions given did not impair Marzette's theory of her case.

SUFFICIENCY OF THE EVIDENCE

This court reviews the sufficiency of the evidence in the light most favorable to the government and will affirm the jury decision unless no rational trier of fact could have found the defendant committed the offense. *United States v. Morrow,* 977 F.2d 222, 230 (6th Cir. 1992). In order to sustain a conviction, the government must show "the existence of an agreement to violate the drug laws and that each conspirator knew of, intended to join, and participated in the conspiracy." *United States v. Gaitan-Acevedo,* 148 F.3d 577, 586 (6th Cir. 1988). Furthermore, when a conspiracy has been proven, "only slight evidence is necessary to implicate a defendant." *United States v. Lee,* 991 F.2d 343, 348 (6th Cir. 1993). There was sufficient evidence to convict Marzette of money laundering and conspiracy.

Marzette bought property with $45,000 cash in mostly small bills. The drug trafficking operation Marzette was involved in with Bugs Norman generated large amounts of

cash. Marzette was not employed anywhere during the relevant period and neither was Bugs. The jury could reasonably infer from these circumstances that drug trafficking proceeds were used to make the purchase.

The evidence showed that Marzette was involved in the drug trafficking business with Bugs. The jury believed the testimony concerning the exchange of cocaine between Marzette and Kendall. Furthermore, Marzette laundered drug money through her company, MN&N, Inc., and through property she purchased. A jury may infer from money laundering activities that there is a conspiracy to violate drug laws because "money laundering is an integral part of a drug enterprise." *Avery*, 128 F.3d at 971.

THE PROSECUTION'S CLOSING ARGUMENT

Marzette claims she is entitled to a new trial because the prosecutor committed misconduct in his closing argument by including an expression of personal opinion that Marzette had lied. However, the comment was simply an argument that the jury should infer that Marzette had lied. A prosecutor has reasonable latitude in his closing argument and where a case involves two conflicting stories it is reasonable to argue that one side is lying. *United States v. Collins*, 78 F.3d 1021, 1040 (6th Cir. 1996). As the district court determined, the prosecutor was appealing to the jury's reasoning and not stating his personal belief. Even if the comment was improper, the court gave curative instructions when it told the jury that the "prosecutor's opinion as to whether the witnesses are telling the truth is simply not relevant."

QUID PRO QUO FOR TESTIMONY

Marzette claims her conviction should be reversed because the witnesses against her testified in exchange for leniency. The government did not violate Marzette's Due Process rights by providing a quid pro quo to witnesses for their testimony. *United States v. Ware,* 161 F.3d 414, 419 (6th Cir 1998)

Marzette's conviction is AFFIRMED. The district court's grant of a new trial to Wheat is REVERSED and that case is REMANDED for further proceedings consistent with this decision.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

[Filed July 24, 1998]

No. CR-3-93-34(8)

UNITED STATES OF AMERICA,
Plaintiff,

v.

WAYNE L. WHEAT,
Defendant.

DECISION AND ENTRY SUSTAINING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON COUNT 9 OF INDICTMENT; CONVICTION ON COUNT 9 VACATED; COUNT 9 DISMISSED; TERMINATION ENTRY

Based upon the reasoning and citations of authority set forth upon the record in open Court, on July 14, 1998 (see attached transcript), this Court, having *sua sponte* reconsidered its earlier decisions overruling the Defendant's Motion for Judgment of Acquittal on Count 9 of the Indictment, said motion based upon improper venue, made at

the conclusion of the Government's case-in-chief and post trial, sustains said motion in its entirety. The conviction on Count 9 is vacated. Count 9 is dismissed.[1]

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

July 23, 1998

/s/_____
WALTER HERBERT RICE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Copies mailed to:

Ralph Kohnen, Esq.
James R. Willis, Esq.
United States Marshal
United States Probation Department
United States Pretrial Services

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[1] For easy reference, the Indictment returned in the Western District of Missouri, Central Division, against Vickie Cabrales is attached.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

[Filed July 20, 1998]

Revised Case NO. CR-3-93-34 (8)

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
WAYNE WHEAT,)
Defendant.)
)

BE IT REMEMBERED, that upon the sentencing hearing of the above-entitled matter held in the United States District Court for the Southern District of Ohio, Western Division, before the Honorable Walter H. Rice, Chief Presiding, and commencing on Tuesday, the 14th day of July, 1998, beginning at 12:48 o'clock p.m., the following proceedings were had.

APPEARANCES:

On behalf of the Plaintiff:

By: Ralph W. Kohnen
Assistant United States Attorney
220 U.S. Post Office & Courthouse
Fifth & Walnut Streets

Cincinnati, Ohio 45202

On behalf of the Defendant:

By: James R. Willis
Attorney at Law
Suite 350
310 Lakeside Avenue, N.W.
Cleveland, Ohio 44113

* * *

(Thereupon, the following proceedings were had in open court.)

THE COURT: Case CR-3-93-34(8) , United States of America versus Wayne Wheat. The Defendant is in open Court with counsel of record, James Willis. The Government is present in the person of Assistant United States Attorney Mr. Ralph Kohnen. We are here for purposes of sentencing. Before we reach that point, the Court has a legal issue which must be resolved.

As those of you who were in attendance on June 16th realize, the Court has sua sponte reconsidered its earlier decision denying the motion of the Defendant for a judgment of acquittal on count nine, reconsideration had on the basis of United States versus Cabrales, 66 United States Law 84423 and 1998 Westlaw 274465, a decision of the United States Supreme Court from June 1st of 1995.

The motion that this Court is reconsidering, a motion for judgment of acquittal on count nine, due to improper venue in the Southern District of Ohio, was a motion made by

the Defendant through counsel at the conclusion of the Government's case in chief and, once again, posttrial.

This Defendant was convicted by a duly impaneled jury of count nine of the indictment charging him with money laundering on June 15th of 1989 when he and Stuart Norman, as it was alleged, purchased a 1989 Ferrari Testarosa for two hundred sixteen thousand dollars in United States currency knowing that all or part of the money involved represented proceeds of the selling and distribution of controlled substances. This 1989 Ferrari Testarosa, the evidence showed, was purchased in the State of Florida. That was the count of conviction.

Mr. Wheat had also been charged in the same indictment, in count one, with conspiracy to possess with intent to distribute and to distribute in excess of one kilogram of heroin and in excess of five kilograms of cocaine.

The indictment in count one set forth fifty-eight separate overt acts, five of which named the Defendant. Overt acts twelve through fourteen involved a fifty thousand dollar transaction with Jacqueline Marzette in 1987. Overt acts thirty-three and thirty-four were the acts involved in the substantive act of money laundering, of which the Defendant was convicted.

In addition, it should be indicated that in the conspiracy count, count one, Mr. Wheat was not charged with anything to do with the selling or trafficking in or possessing of illegal substances; rather, he was charged in somewhat general fashion.

The overt acts made matters specific, but he was charged in the body of the indictment in somewhat general fashion with conducting financial dealings in cash in order to conceal the income generated from illegal trafficking in controlled substances and to promote and facilitate illegal trafficking in controlled substances.

In addition to count nine, the count of conviction, and count one, the conspiracy count, Mr. Wheat had also been charged in count ten with causing a false Internal Revenue Service form, 8300, to be filed with the Internal Revenue Service.

Count ten was dismissed by the Court during trial. Count one, the conspiracy count, resulted in a conviction of this Defendant, and in ruling on posttrial motions, this Court, while overruling the motion for judgment of acquittal on the conspiracy count, sustained the Defendant's motion for a new trial on that charge. That decision by this Court is currently on appeal.

A lengthy record was made on June 16th this year, during which time the impact of the Cabrales decision or lack of impact was discussed between Court and counsel. Indeed, as I believe the Court made clear, it had been delaying sentencing in this case knowing that the Supreme Court had accepted cert in the Cabrales decision.

The Court concludes that it cannot do a better job of stating the issues than it did on June 16th, so an effort in that regard will not be made. The Court made certain tentative decisions on June 16th, one of which I can make absolute today, and that is that the Cabrales decision did not overrule

United States versus Beddow, B E D D O W, 947 F.2d 1330, a Sixth Circuit case from 1992.

Indeed, the Supreme Court left open the question of the viability of Beddow for another date in this language, and this is a quote: Money laundering, the Court of Appeals acknowledged, arguably might rank as a continuing offense triable in more than one place if the launderer acquired the funds in one district and transported them into another, but that is tellingly not this case.

We're still in the Supreme Court quote from Cabrales. In the counts at issue, the Government indicted Cabrales for transactions which began, continued, and were completed only in Florida. Under these circumstances, venue is improper. Cabrales dealt with a situation where all the substantive laundering activities occurred in a state other than the state of the forum, in other words, a state other than Missouri.

In other words, Cabrales was not charged with the drug conspiracy which generated the funds or with having transported the funds derived from illegal drug activities from Missouri to Florida. Cabrales was charged only with Florida-based acts, and as the Supreme Court indicated, the money laundering counts alleged no acts committed by Cabrales in the State of Missouri.

So Cabrales, as I have indicated dealt with a situation where all of the substantive money laundering activities occurred in a state other than the venue of prosecution. Venue is deemed improper in Missouri, where Cabrales was not charged as an aider and abettor for acts done in Missouri.

Here with regard to Stuart Norman, under the Beddow decision, which this Court concludes was not overruled by Cabrales, with regard to Stuart Norman, venue for count nine was proper in the Southern District of Ohio.

Stuart Norman's activities constituted a continuing violation in that there is evidence to support a finding by the jury that the proceeds ultimately laundered in Florida, the purchase of the Ferrari Testarosa, were generated in Ohio by illegal drug sales and then taken to Florida either by Norman or at his direction.

And certainly an argument could be made that if venue is proper in the Southern District of Ohio as to Norman, the principal, then it would likewise be proper as to the aider and abettor, Mr. Wheat, even without proof that Mr. Wheat did every act constituting the crime charged.

It is too well established to require a great deal of discussion that venue for aiding and abetting an act occurs where the principal commits it, and there are a host of cases holding that aiding and abetting may be tried in the district where the principal commits the crime.

So at the conclusion of the hearing on June 16th, while this Court left open the opportunity for further briefing and further consideration, the Court had certain inclinations, and those inclinations are stated as follows: Given that the Supreme Court in Cabrales had concluded that venue was proper in the district in which the financial transactions constituting the money laundering offenses occurred rather than in the district in which the funds were laundered or from

-- withdraw that. Let me read that again so there's no mistake as to what I'm saying.

In the Cabrales decision, the Supreme Court concluded that venue was proper in the district in which the financial transactions constituting the money laundering offenses occurred rather than in the district in which the funds that were laundered had been generated or the district from which those funds had been transported to the district in which the financial transactions constituting the money laundering offenses had taken place.

For reasons already stated the Court was inclined on the 16th of June and indeed has made that inclination definite today in holding -- was inclined to hold and has held that the Beddow decision, a Sixth Circuit decision, retains viability as to a continuing offense; that because of that, venue was proper in the Southern District of Ohio vis-a-vis Stuart Norman, the person whom it is alleged and about whom there is sufficient evidence to conclude that he engaged in the illegal drug trafficking which generated the funds, the funds being transported by him or at his direction and control to Florida, where substantive money laundering offenses occurred.

Because of the fact that it is hornbook law that an aider and abettor can be prosecuted in the district in which the principal can be prosecuted and since it was satisfactory to prosecute Norman in the Southern District of Ohio, it likewise, the Court was inclined to say, was proper to prosecute Mr. Wheat, the aider and abettor, in the Southern District of Ohio. The Court has indicated that was its inclination. Let's see whether that inclination has held up in the light of further consideration.

It has occurred to the Court that -- let me withdraw that, and let me approach that in another fashion. A comparison of Cabrales with the Wheat case and an identification of the similarities is so helpful here. In both Cabrales and Wheat, the money that was laundered was generated in the district in which the offense was charged.

In both cases, the money was transported from the district in which the money was generated, the district in which the offense was charged, to the district in which the financial transactions constituting the offense occurred.

In neither case, Cabrales or Wheat, was the Defendant charged by specific count and/or by overt act with generating the funds from illegal activities, which funds were ultimately laundered in another district.

In Cabrales, the Defendant was not charged with transporting the money from the district in which it was generated to the district in which it was laundered. In this case, Wheat was not charged with transporting the funds, nor was evidence presented that he did so or that it was done under his direction and control.

In both cases, Cabrales and Wheat, the Defendant was present in the district in which he or she was charged. In both cases, the money had to move from the district in which the funds were generated to that in which the money laundering activities occurred.

And in both cases, the Courts assumed and will assume that the individual involved knew that the proceeds were drug money. The Supreme Court assumed Cabrales

knew this, and this Court assumes for purposes of this discussion that Mr. Wheat knew that the funds being laundered were the proceeds of illegal drug activities.

Although Cabrales was not charged as an aider and abettor, she could have been convicted as such even in the absence of such a charge. Wheat was charged as an aider and abettor, and in support of the fact that Cabrales, even though not charged as an aider and abettor, could have been convicted as such even in the absence of such a charge, the Court cites the following case applicable case from the Eighth Circuit: United States versus McKnight, 799 F.2d 433 at 445, an Eighth Circuit case from 1986.

Cabrales was not charged in the drug conspiracy while Wheat was; however, Cabrales was charged in a money laundering conspiracy, prosecution of which the District Court said could proceed, a conclusion that the Supreme Court had no occasion to revisit, and moreover, in this case there is no evidence that Mr. Wheat generated the funds in the Southern District of Ohio.

As I have indicated, he is charged generally with financial transactions, with money laundering, and he is charged specifically in five overt acts or mentioned in five overt acts, numbers twelve through fourteen, dealing with a 1987 transaction with Jacqueline Marzette and overt acts thirty-three and thirty-four dealing with the 1989 substantive matters dealt with in count nine, the money laundering count.

By comparing Cabrales with this case, the similarities demonstrate to this Court, for reasons that I will give in a moment, the meaninglessness of the Cabrales decision if

venue is found proper in this district as to Wheat merely because he was charged as an aider and abettor to count nine of the indictment charging money laundering and merely because venue is proper as to the principal that Mr. Wheat allegedly aided and abetted.

To put it in another way, if venue is proper as to Wheat in the Southern District of Ohio based on count nine of the indictment merely because he was charged as an aider and abettor to that count charging money laundering and merely because venue was proper as to the principal, Stuart Norman, the principal that Mr. Wheat allegedly aided and abetted, if venue is proper as to Wheat under those circumstances, then for reasons which this Court will discuss in just a moment, the Cabrales decision of the United States Supreme Court will be meaningless.

If the way around United States versus Cabrales -- I'll now give an official cite, 118 Supreme Court 1772, a 1998 case -- if the way around Cabrales is merely to charge the Defendant as an aider and abettor, then it would not matter in what district the financial transaction constituting the substantive money laundering offense occurred since venue would always be proper in the district in which the proceeds were generated and from which they were transported to the district in which that transaction took place.

If such an exception to Cabrales were recognized, that Supreme Court case would be totally without meaning. Given that Cabrales could have been charged as an aider and abettor or convicted as an aider and abettor even if not so charged -- United States versus McKnight is cited here -- Cabrales would be rendered meaningless.

United States versus Beddow, 947 F.2d 1330, a Sixth Circuit case from 1992, survives Cabrales, but only in the situation where the launderer was involved in the generation of proceeds and transported them to the district where the substantive money laundering transactions took place.

In this case, the Wheat case, there is no evidence that he was directly involved in the generation of the funds which were laundered in Florida or that he transported them or caused them to be transported to that state. While Beddow survives Cabrales, Beddow is not applicable to the Wheat case, Cabrales is applicable.

The fact that the 1987 money laundering transactions with Marzette, if, indeed, that is what they were, and I'm speaking now of the fifty thousand dollar transaction -- the fact that these transactions with Marzette occurred in the Southern District of Ohio is of no import since Wheat was neither charged nor convicted of that offense.

Rather, count nine charged Wheat with the discrete act of laundering two hundred and sixteen thousand dollars on or about June 15th of 1989, two years after the episode with Marzette. All acts of Wheat constituting the substantive offense alleged in count nine occurred in Florida.

While venue for the 1987 episode would have been proper in this district, Wheat was not charged with money laundering arising out of it; in other words, was not charged with money laundering arising out of the fifty thousand dollar transaction with Marzette.

Accordingly, this Court concludes that venue as to count nine was improper in the Southern District of Ohio. The Court, having reconsidered sua sponte the Defendant's motion for judgment of acquittal on count nine sustains that motion. The conviction on count nine is vacated, count nine is dismissed, and this Court is in recess.

(Thereupon, the hearing was concluded at 1:12 o'clock p.m.)

STATE OF OHIO)
SS: CERTIFICATE
COUNTY OF MONTGOMERY)

I, Caryl L. Blevins, a Notary Public within and for the State of Ohio, duly commissioned and qualified,

DO HEREBY CERTIFY that the above-named hearing was reduced to writing by me stenographically in the presence of the parties and thereafter reduced to typewriting.

I FURTHER CERTIFY that I am not a relative or Attorney of either party nor in any manner interested in the event of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at Dayton, Ohio, on this 20th day of July, 1998.

/s/_____
CARYL L. BLEVINS
NOTARY PUBLIC,

STATE OF OHIO
My commission expires 7-16-03

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

[Filed September 6, 1995]

No. 92-00103-06 CR-0-5

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
)
VICKIE S. CABRALES,)
[DOB: 07/20/65])
Defendant.)

COUNT ONE:
18 U.S.C. § 371 95-4022-01-CR-R-5
NMT 5 Years
$250,000 Fine
Class D Felony
Supervised Release: NMT 3 Years

COUNT TWO:
18 U.S.C. § 1956 (a) (1) (B) (ii)
NMT 20 Years
$500,000 Fine
Class C Felony
Supervised Release: NMT 3 Years

COUNT THREE:
18 U.S.C. § 1957 95-04022
NMT 10 Years
$250,000 Fine
Class C Felony
Supervised Release: NMT 3 Years

$50 Special Assessment
(Each Count)

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

That from on or about January 22, 1991, to on or about January 28, 1991, in the Western District of Missouri, and elsewhere, VICKIE S. CABRALES, defendant herein, did knowingly and intentionally combine, conspire, confederate and agree with others both known and unknown to the grand jury, to offenses against the United States, to wit, conducting and affecting to conduct a financial transaction affecting interstate and foreign commerce, that is, the withdrawal of United States currency from the AmSouth Bank of Florida, which involved proceeds of a specified unlawful activity, that is, the knowing and intentional distribution of cocaine, a Schedule II controlled substance, knowing that the transaction was designed in whole or in part to avoid a transaction reporting requirement under federal law and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial

transaction represented the proceeds of some form of unlawful activity, contrary to Title 18, United States Code, Section 1956(a)(1)(B)(ii); all in violation of Title 18, United States Code, Section 371.

OVERT ACTS

In furtherance of this conspiracy and to effectuate and accomplish the unlawful objectives thereof, one or more of the conspirators committed the following overt acts, among others:

1. On or about January 22, 1991, VICKIE S. CABRALES withdrew $9,500.00 in currency from the AmSouth Bank of Florida.

2. On or about January 23, 1991, VICKIE S. CABRALES withdrew $9,500.00 in currency from the AmSouth Bank of Florida.

3. On or about January 24, 1991, VICKIE S. CABRALES withdrew $9,500.00 in currency from the Amsouth Bank of Florida.

4. On or about January 28, 1991, VICKIE S. CABRALES withdrew $9,500.00 in currency from the AmSouth Bank of Florida.

COUNT TWO

That on or about January 23, 1991, in the Western District of Missouri, and elsewhere, VICKIE S. CABRALES, defendant herein, did knowingly conduct and attempt to

conduct a financial transaction affecting interstate and foreign commerce, to wit, the withdrawal of $9,500 in United States Currency from the AmSouth Bank of Florida, which involved the proceeds of a specified unlawful activity, that is, the knowing and intentional distribution of cocaine, a Schedule II controlled substance, knowing that the transaction was designed in whole or in part to avoid a transaction reporting requirement under federal law and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction, that is, the funds in the amount of $9,500 represented the proceeds of some form of unlawful activity; all in violation of Title 18, United States Code, Section 1956 (a) (1) (B) (ii).

COUNT THREE

That on or about January 22, 1991, in the Western District of Missouri, and elsewhere, VICKIE S. CABRALES, defendant herein, did knowingly engage and attempt to engage in a monetary transaction, affecting interstate or foreign commerce, in criminally derived property of a value greater than $10,000, that is, the deposit of a monetary instrument in the amount of $40,000, with the AmSouth Bank of Florida, such property having been derived from a specified unlawful activity, that is, the knowing and intentional distribution of cocaine, a Schedule II . . .

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

[Filed January 16, 1996]

No. CR-3-93-034 (08)

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WAYNE L. WHEAT, *Defendant*.

DECISION AND ENTRY SUSTAINING IN PART, OVERRULING IN PART AND RESERVING RULING IN PART UPON MOTION OF DEFENDANT WAYNE L. WHEAT FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, FOR A NEW TRIAL (DOC. #462); MOTION OVERRULED IN ITS ENTIRETY WITH REGARD TO REQUEST FOR JUDGMENT OF ACQUITTAL; MOTION SUSTAINED WITH REGARD TO REQUEST FOR NEW TRIAL ON COUNT I OF THE INDICTMENT (CONSPIRACY IN VIOLATION OF 21 U.S.C. § 846); CONVICTION ON CONSPIRACY COUNT VACATED AND NEW TRIAL ORDERED ON SAID COUNT; MOTION OVERRULED IN PART AND

NOT RULED UPON IN PART WITH REGARD TO REQUEST FOR NEW TRIAL ON COUNT 9 OF THE INDICTMENT (MONEY LAUNDERING IN VIOLATION OF 18 U.S.C. § 1956); CONFERENCE CALL SET TO DISCUSS CERTAIN PROCEDURES

On Saturday, November 12, 1994, following a joint trial with Co-Defendant Jacquelyn Marzette, the jury found the Defendant Wayne L. Wheat ("Wheat" or "Defendant") guilty of one count of conspiracy, in violation of 21 U.S.C. § 846, and one count of money laundering, in violation of 18 U.S.C. § 1956.[1] This case is now before the Court on Wheat's Motion for Judgment of Acquittal or, in the alternative, for New Trial (Doc. #462). In support of his motion, Wheat presents nine separate arguments.[2] As a means of analysis, the Court will initially set forth the standards which govern such motions Under Rules 29 and 33

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[1] The Defendant was also charged with evading a reporting requirement in a cash transaction involving more than $10,000, in violation of 26 U.S.C. § 6050I (f) (1) (B) and § 7206. At the conclusion of the government's case-in-chief, this Court sustained the Defendant's oral motion for judgment of acquittal on that charge.

[2] Wheat also incorporates by reference all pre-trial and in-trial motions and objections which he has made in this prosecution, which the Court has previously overruled and argues that he is entitled to a judgment of acquittal or, in the alternative, a new trial on the basis of same. See Doc #462 at 3. The Court incorporates by reference its earlier rulings and the reasoning therefor on these motions and objections and, thus, overrules this branch of the Defendant's motion,

of the Federal Rules of Criminal Procedure. Then, the Court will turn to the Defendant's nine arguments, addressing them, with one exception, in the order in which the Defendant has presented them. The Court will discuss the third and sixth branches of the Defendant's motion together, since they raise related arguments.

Rule 29(c) of the Federal Rules of Criminal Procedure provides:

> Motion after discharge of jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury.

When ruling on a motion for judgment of acquittal after the jury has returned a verdict of guilty, a court must review the evidence in the light most favorable to the prosecution and uphold the verdict of guilty if "'any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.'" United States v. Wuliger, 981 F.2d 1497, 1509 (6th Cir. 1992), cert. denied, 114 S.Ct. 1293 (1994) (quoting United States v. Busacca, 936 F.2d 232, 239

(6th Cir.), cert. denied, 502 U.S. 985 (1991)) (emphasis in the original). See also, Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Epley, 52 F.3d 571, 575 (6th Cir. 1995); United States v. Spears, 49 F.3d 1136, 1140 (6th Cir. 1995); United States v. Ingaro, 844 F.2d 314, 315 (6th Cir. 1988). In ruling on such a motion, a court is not permitted to weigh the evidence or to determine the credibility of witnesses. United States v. Turner, 995 F.2d 1357, 1362 (6th Cir.), cert. denied, 114 S.Ct. 282 (1993). In addition, the court must consider the evidence as a whole and draw all legitimate inferences in favor of the prosecution. United States v. Farley, 2 F.3d 645, 650 (6th Cir.), cert. denied, 114 S.Ct. 649 (1993). See also, United States v. Odom, 13 F.3d 949, 959 (6th Cir.), cert. denied, 114 S.Ct. 1859 (1994).

Rule 33 of the Federal Rules of Criminal Procedure provides that a "court on the motion of a defendant may grant a new trial if required in the interest of justice." Motions for a new trial are to be granted sparingly and with caution, and the defendant bears the burden of proving the need for a new trial. Turner, 995 F.2d at 1364. In United States v. Ashworth, 836 F.2d 260, 266 (6th Cir. 1988), the Sixth Circuit set forth the appropriate standard for a district court to apply when ruling on the basis that the verdict against the weight of the evidence.

> "A Motion for Acquittal and a Motion for New Trial based on the ground that the verdict is against the great standards. The Motion for New Trial involves a much broader standard of review than a Motion for Acquittal. A verdict may well be against the great weight of the evidence, but, nevertheless,

> be substantial enough to permit reasonable jurors to draw an inference of guilt. In a Motion for New Trial, the trial judge can consider evidence to insure that there is not a miscarriage of justice. It has often been said that he/she sits as a thirteenth juror.
>
> Nevertheless, granting a Fed. R. Crim. P. 33 Motion for New Trial attacking the weight of the evidence is a discretionary matter. The Court should exercise such discretion only in the extraordinary circumstances where the evidence preponderates heavily against the verdict."

Id. at 266 (quoting United States v. Turner, 490 F.Supp. 583, 593 (E.D.Mich. 1979), affirmed, 633 F.2d 219 (6th Cir. 1980), cert. denied, 450 U.S. 912 (1981)). See also, United States v. A. Lanoy Alston D.M.D., P.C., 974 F.2d 1206, 1211-12 (9th Cir. 1992). Of course, a motion for new trial is not limited to challenges to the sufficiency of the evidence; rather, a new trial may be granted whenever required "in the interest of justice."

First, Wheat's conviction for money laundering arose out of a financial transaction which took place in Coral Gables, Florida, in connection with the purchase of a 1989 Ferarri Testarossa in that city. Based upon that fact, Wheat argues that he is entitled to a judgment of acquittal on the money laundering count, because venue was improperly laid in the Southern District of Ohio. The issue of whether the money laundering count was properly venued in this District was discussed at length during the trial of this prosecution. For the reasons which the Court set forth upon the record

during the trial, as well as the following, the Court concludes that the prosecution of the money laundering count was properly venued in the Southern District of Ohio.

The government has the burden of proving by the preponderance of the evidence that venue is proper. United States v. Beddow, 957 F.2d 1330, 1335 (6th Cir. 1992). Beddow is particularly instructive to this prosecution. Therein, the defendant was indicted in the Western District of Michigan for, inter alia, the offense of money laundering, in violation of 18 U.S.C. § 1956. The defendant's trial took place in that district, and, upon appeal, the defendant argued that venue was improper. According to the defendant, his prosecution should have occurred in the Eastern District of Michigan. The evidence introduced at the Defendant's trial established that the defendant had generated funds from drug dealing in the Western District of Michigan. He gave a portion of those funds to a confederate in that judicial district, so that the confederate could use the funds to purchase emeralds. The confederate traveled with the funds to the Eastern District of Michigan, where he purchased travelers checks. When he purchased the travelers checks, the confederate filled out a currency transaction report ("CTR"), which did not identify the defendant as the source of the funds.[3] The purchase of the travelers checks and the execution of the CTR were the bases of the charge of money laundering. The defendant argued to the Sixth Circuit that venue was proper only in the Eastern District of Michigan, where the travelers checks had been purchased and where the

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[3] The confederate subsequently traveled to Brazil where he purchased emeralds.

CTR had been executed (i.e., where the proceeds of the drug transactions had been "laundered"). Relying Upon 18 U.S.C. § 3237(a), which provides that, unless the statute violated prescribes venue, offenses committed in more than one district "may be inquired of and prosecuted in any district in which the offense was begun, continued or computed," the Sixth Circuit rejected that argument, in writing:

> Beddow's argument focuses too narrowly on the act of filing the required CTR disclosures without considering that transporting as well as procuring the money illegally are essential elements of money laundering. See United States v. Donahue, 885 F.2d 45, 50 (3rd Cir. 1989) (venue on charge of transporting currency without filing proper disclosure appropriate where transport began, i.e., district where defendant boarded flight from Pennsylvania to Miami, prior to leaving country from Miami); United States v. Greene, 862 F.2d 1512 (11th Cir.) (venue proper in the Middle District of Florida for making false statements to bank in New York because offense was initiated in Florida), cert. denied, 493 U.S. 809 (1989). We hold that Beddow's money laundering offenses are cognizable under 18 U.S.C. § 3237 (a) as continuing offenses.
>
> Beddow contends that venue in the Western District of Michigan was improper for the money laundering charges because the purchase of the traveler's checks at the

> Comerica Bank and their transportation out of the country from Detroit Metro Airport both occurred in the Eastern District. Under section 3237 (a) venue is proper in any district where any part of the money laundering scheme occurred. In the present case, it is clear that the funds involved in both money laundering counts were acquired by selling drugs in the Western District of Michigan. Also, Count 4 involved travel that originated in [the Western District of Michigan]. We conclude that these acts were essential elements of the money laundering offenses and that they were sufficient to confer venue under section 3237(a). See United States v. Hernando Ospina, 798 F.2d 1570, 1577 (11th Cir. 1986) (venue proper under 18 U.S.C. § 3237(a) in the district where the cash was accumulated in a prosecution for failure to file a CTR). Although venue may have been proper in the Eastern District, venue is not limited to a single district when a crime implicates more than one location.

Id. at 1335-36. See also, United States v. Medina, 992 F.2d 573, 587 (6th Cir. 1993), cert. denied, 114 S.Ct. 1049 (1994).

Herein, Wheat, like Beddow, was prosecuted for the offense of money laundering. Although the actual financial transaction which led to Wheat's conviction for this offense occurred in Coral Gables, Florida (rather than in the Southern District of Ohio), there is proof that the funds which were

used in that transaction were generated within this judicial district. Indeed, evidence was presented at trial which would have permitted a rational jury to have found that proceeds from Stuart Norman's drug dealing within the Southern District of Ohio were the source of money used to purchase the Ferarri Testarossa in Florida. In addition, travel relating to the money laundering count (from Dayton to Coral Gables) originated in the Southern District of Ohio. Accordingly, the Court overrules the first branch of Wheat's motion, with which he argues that he is entitled to judgment of acquittal on the money laundering count, because that count was not properly venued in the Southern District of Ohio.

Second, Wheat argues that sufficient evidence was not presented to sustain his conviction for money laundering.[4] In particular, Wheat argues that there was not sufficient evidence presented for the jury to have found that the government proved, beyond a reasonable doubt, two of the essential elements of that offense, to wit: that the funds used in connection with the purchase of the Ferarri Testarossa were proceeds from drug transactions and that he knew that the funds were such proceeds. See Doc. #462 at 6-11. The two matters identified by Wheat are essential elements of the offense of money laundering. This Court instructed the jury that the government was required to prove both of these

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[4] Wheat does not expressly state whether he makes this argument in support of his request for a new trial. Since Wheat moves, in the alternative, for both judgment of acquittal and for a new trial, the Court construes this branch of his motion as requesting either judgment of acquittal, or, if said judgment is not granted, a new trial.

elements, beyond a reasonable doubt, in order for the jury to convict Wheat of the offense of money laundering. Since Wheat's argument focuses upon the question of whether sufficient evidence was presented to support the jury's finding that the government had proved both of these elements beyond a reasonable doubt, the Court turns to the question of whether there was such evidence.

There was sufficient evidence for the jury to have found, beyond a reasonable doubt, that the money used in connection with the purchase of the Ferarri Testarossa, the money which underlaid this offense, was the proceeds of drug transactions. The Court reaches that conclusion, applying both the strict standard for examining evidence which is used to resolve motions under Rule 29 and the somewhat more liberal standard applicable to motions under Rule 33. The evidence established that approximately $216,000 in small denominations of cash (all of which were smaller than $100) was given to Luis Bulas ("Bulas"), who then obtained a cashier's check for slightly more than $202,000.[5] That transaction underlaid the money laundering count. The cashier's check, for which a price of $14,000 had been paid, was used to pay for the Ferarri Testarossa. The evidence also established that the Ferarri Testarossa was owned by Stuart Norman. Finally, there was more than ample evidence demonstrating that Stuart Norman generated large sums of cash from the sale of drugs. Putting these three facts together, the jury heard evidence that cash was used to purchase a Ferarri Testarossa on behalf of a drug dealer.

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[5] The difference between the two figures was Bulas' profit.

Based upon that evidence, a rational jury could find, beyond a reasonable doubt, that proceeds from drug transactions were used in connection with this transaction. Moreover, the finding that such proceeds were used is not heavily against the preponderance of the evidence and, thus, does not present extraordinary circumstances warranting a new trial.

Whether Wheat knew that proceeds from drug transactions were used in this transaction presents a closer question. There was no direct evidence that he had such knowledge. Indeed, Wheat testified during his trial that he was not aware that Stuart Norman was involved in drug transactions. The question then becomes whether there was circumstantial evidence from which the jury could have found, beyond a reasonable doubt, that Wheat knew that the money used in the transaction was the proceeds of such transactions. The first bit of circumstantial evidence is the fact that the transaction involved approximately $216,000 in cash, all in bills of small denomination (no bill was as large as $100). In addition, it is not just the fact that a large quantity of cash was used in the transaction; rather, the method in which the transaction was structured is also circumstantial evidence that Wheat knew the money constituted proceeds from drug transactions. Construing the evidence most strongly in favor of the government, as the Court is required to do when ruling on a motion for judgment of acquittal, Wheat and another person, who, at that time, introduced himself as Howard Donaldson and who was identified during trial as Stuart Norman, appeared at the Jaguar Collection (the auto agency from which the automobile was purchased) in the middle of June, 1989, in order to purchase a 1989 Ferarri Testarossa. They had with them a package containing approximately $216,000 in cash. They

were told that, if they paid for the automobile with cash, a currency transaction report would be filed with the IRS. Wheat and Stuart Norman were then referred to Bulas who, in exchange for $216,000 in cash, provided them with a cashier's check in the amount of approximately $202,000. In other words, Wheat and Stuart Norman paid approximately $14,000 for a cashier's check (almost 7% of the face value of the check), rather than pay cash to the Jaguar Collection and risk having that entity file a currency transaction report. That evidence is sufficient to have allowed a rational jury to have found that the government proved, beyond a reasonable doubt, that Wheat knew that the money used in the transaction in question constituted the proceeds of drug trafficking. Moreover, the finding that Wheat knew the property was such proceeds is not against the preponderance of the evidence and, thus, does not present extraordinary circumstances warranting a new trial.

Accordingly, the Court overrules the second branch of Wheat's Motion for Judgment of Acquittal or, in the alternative, for a New Trial (Doc. #462), with which he challenges the sufficiency of the evidence to sustain his conviction for money laundering.

Third and Sixth, Wheat argues, in the third branch of his motion, that sufficient evidence was not presented to sustain his conviction for conspiracy to distribute cocaine.[6]

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[6] With respect to the third branch of his motion, Wheat does not expressly state whether he makes this argument in support of his request for judgment of acquittal, or in support of his request for a new trial. Since Wheat moves, in the alternative, for both judgment of acquittal and for a new trial, the Court construes that

See Doc. #462 at 11-22. In the sixth branch of his motion, Wheat argues that due process is violated when an accused's conviction for being part of drug conspiracy is predicated solely upon proof that he committed one separate and distinct offense that assertedly furthered the goals of the conspiracy. Id. 35-37. Count I of the indictment in this case, in which Wheat was charged with conspiracy in violation of 21 U.S.C. § 846, alleged:

> Beginning in or before 1983, and continuing up to and including the date of the indictment [May 12, 1993], in the Southern District of Ohio and elsewhere, the Defendants, Stuart T. Norman, Jr., Stanley L. Barker, Odis Ayers, Jr., Wilbur K. Norman, Jr., Victor L. Brooks, Raymond Byrd, Jacquelyn Marzette, and Wayne L. Wheat did knowingly and intentionally, unlawfully combine, conspire, confederate and agree with other persons both known and unknown to the Grand Jury to knowingly and intentionally possess with intent to distribute and to distribute in excess of one kilogram of heroin, a Schedule I Controlled Substance, and in excess of five kilograms of cocaine, a Schedule II Controlled Substance, in violation of Title 21 United States Code, Section 841(a) (1) and

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branch of his motion as requesting judgment of acquittal or, if same be not granted, a new trial.

> (b) (1) (A) and Title 18, United States Code, Section 2.

Doc. #1 at 2. In other words, Wheat was accused of being part of a decade-long conspiracy to distribute cocaine and heroin.

In United States v. Ledezma, 26 F.3d 636 (6th Cir. 1994), the Sixth Circuit explained what the government must show in order to convict a defendant for violating § 846:

> Section 846 provides that "any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (1988)
>
> To establish a drug conspiracy under 21 U.S.C. § 846, the government must prove "'that a conspiracy existed, that the accused knew of the conspiracy, and that he knowingly and voluntarily joined it.'" United States v. Barrett, 933 F.2d 355, 359 (6th Cir. 1991) (quoting United States v. Christian, 786 F.2d 203, 211 (6th Cir. 1986)). The essence of conspiracy, of course, is agreement, but proof of a formal agreement is not necessary; "a tacit or material understanding among the parties" will suffice. United States v. Pearce, 912 F.2d 159, 161 (6th Cir. 1990), cert. denied, 498 U.S. 1093 (1991). "'A

> conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan.'" United States v. Blakeney, 942 F.2d 1001, 1010 (6th Cir. 1991) (quoting United States v. Bayers, 787 F.2d 1022, 1026 (6th Cir. 1985)), cert. denied, 112 S. Ct. 646 (1991), and cert. denied, 112 S. Ct. 881 (1992). The government need not show that a defendant participated in all aspects of the conspiracy; it need only prove that the defendant was a party to the general conspiratorial agreement. Further, the connection between the defendant and the conspiracy need only be slight. Id.

Id. at 640. See also, United States v. Odom, 13 F.3d 949, 959 (6th Cir. 1994). In addition, the existence of a criminal conspiracy can be established with circumstantial evidence alone, which "need not remove every reasonable possibility except that of guilt." United States v. Lee, 991 F.2d 343, 348 (6th Cir. 1993).

Herein, the central question is whether Wheat knew of the conspiracy alleged in the indictment and voluntarily joined it. The evidence supports an inference that Wheat helped Marzette launder $50,000, in December, 1987.[7] In addition,

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[7] The uncontroverted evidence established that, in December, 1987, Wheat obtained a cashier's check from his bank in the amount of $50,000, which he gave to Marzette in exchange for a note (either signed by Marzette personally or by her on behalf of MN&N, Inc., the owner of much of the real estate involved in

there was testimony that, in 1991, Wheat stored Stuart Norman's Ferarri Testarossa in the garage at his funeral home for a period of approximately one month, around and about the time that federal agents were seizing Stuart Norman's assets. Indeed, as is discussed above, there was evidence (sufficient to sustain a conviction) that, in connection with the purchase of that automobile in June, 1989, Wheat had helped Norman launder money in Florida, knowing that the money used in that transaction constituted the proceeds of drug transactions in which Norman had engaged. Also, there was evidence that Wheat notarized the signature of Michael Watson on a document by which the ownership of a 1964 Chevrolet El Camino was transferred. The fact that the type of vehicle involved in that transaction was a 1964 Chevrolet

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the drug conspiracy at issue herein). Wheat testified that no payment has been made on the note and that he was not concerned about its repayment. Three days after Marzette gave him the note for $50,000 (which evidenced the loan Wheat had made to her), Wheat deposited $50,000 in cash in his bank account. Although Wheat testified that he had saved the cash which he deposited and that the timing of the loan and his deposit of $50,000 was coincidental, the jury was entitled to disbelieve his testimony and to infer that Wheat received from Marzette the cash which he had deposited. Indeed, that inference was strengthened by the fact that Wheat was not pressing Marzette for the repayment of the alleged loan. In addition, Wheat testified that Marzette had saved the life of one of his sons when he was choking on food. This testimony could explain why Wheat was not concerned about whether Marzette repaid the $50,000 loan. However, the jury was entitled to disbelieve that testimony or decline to draw the inference that Wheat desired from the evidence.

El Camino is of particular significance, because evidence was introduced that those vehicles were particularly suited to use in the drug trade.[8] However, there was no testimony directly tying Wheat to any transaction involving heroin or cocaine. Moreover, no witness testified that he or she delivered the proceeds of a drug transaction to Wheat.

Thus, the question becomes whether the four incidents mentioned above (money laundering in 1987 with co-Defendant Marzette and in 1989, thus allowing Stuart Norman to avoid a currency transaction report being filled out in his name; storing Stuart Norman's Ferarri, the subject of the 1989 money laundering, in 1991; and notarizing the signature of Watson on the document by which the ownership of the 1964 El Camino, a vehicle used to transport drugs, was transferred) are sufficient for a rational jury to have found that the government proved, beyond a reasonable doubt, that Wheat knew of the conspiracy, and that he knowingly and voluntarily joined it. Courts have noted on many occasions that there is a link between money laundering and drug conspiracies, so that evidence establishing that the defendant participated in a money laundering is sufficient to infer that he knew of the conspiracy and voluntarily and intentionally joined it. See e.g., United States v. Gallo, 927 F.2d 815, 820-21 (5th Cir. 1991). Herein, construing the evidence in the manner most favorable to the government, Wheat engaged in money laundering on two occasions. Moreover, there was

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[8] That type of vehicle had a panel which, when removed, allowed access to an area where drugs or large sums of cash could be transported secretly when the panel was replaced.

evidence that Wheat stored Norman's Ferarri Testarossa in the garage at Wheat's funeral home when federal agents were seizing Norman's assets. Construing the evidence in the manner most favorable to the government, as this Court is required to do when ruling on a motion for judgment of acquittal, the jury was entitled to infer from this otherwise innocuous act of storing Norman's vehicle, which was the object of the money laundering charge for which Wheat was convicted, because of the time at which it occurred, that the Defendant was a knowing and voluntary participant in the conspiracy. In addition, the Defendant notarized Watson's signature on a document by which the ownership of a 1964 Chevrolet E1 Camino was transferred. The jury was entitled to infer from Wheat's participation in the transfer of the ownership of a vehicle which was particularly suitable for use in the drug trade that Wheat was a knowing and voluntary participant in the alleged conspiracy. In sum, there is sufficient evidence from which the jury could have drawn an inference that Wheat knew of the conspiracy, and that he knowingly and voluntarily joined it. Accordingly, the Court concludes that Wheat is not entitled to judgment of acquittal on the conspiracy count.[9]

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[9] In his sixth argument, Wheat asserts that he was denied due process, because his conviction for being part of a drug conspiracy was based solely upon proof that he committed a separate and distinct offense that assertedly furthered the goals of the conspiracy. See Doc. 462 at 35-37. Putting aside for a moment the fact that there was evidence that Wheat engaged in more than just one incident of money laundering, that he stored Stuart Norman's Ferarri Testarossa and that he notarized Watson's signature on the document by which ownership of the 1964 E1 Camino was transferred, this Court cannot agree with the

Of course, the standard which the Court must apply to Wheat's alternative request for a new trial under Rule 33 is

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Defendant that this argument provides the basis for entering a judgment of acquittal on the conspiracy count. In United States v. Dela Espriella, 781 F.2d 1432, 1436 (9th Cir. 1986), the case upon which the Defendant places primary reliance support of this argument, the Ninth Circuit noted that merely because a defendant has engaged in money laundering does not mean that he has participated in a conspiracy to distribute drugs. In United States v. Todd, 920 F.2d 399, 406 (6th Cir. 1990) the Sixth Circuit noted:

> Money-laundering is an act integrally related to the success of a conspiracy to distribute drugs. United States v. Dela Espriella, 781 F.2d 1432, 1436 (9th Cir. 1986); United States v. Orozco-Prada, 732 F.2d 1076 1080 (2d Cir.) cert. denied, 469 U.S. 845 (1984). Of course, evidence of money-laundering alone is not sufficient to link a person who launders money with a conspiracy to violate narcotics laws. The government must demonstrate a "sufficient link" between defendant's money-laundering and the drug distribution conspiracy in order to prove that defendant was part of a conspiracy. Dela Espriella, 781 F.2d at 1436.

Herein, for the reasons set forth in the body of this Decision, this Court concludes that the government did prove a sufficient link between the Defendant's act of money laundering and the drug conspiracy with which he was charged and convicted for the conviction to survive a motion for judgment of acquittal.

less strict. In ruling on a motion for a new trial under Rule 33, the Court functions somewhat like the thirteenth juror and is entitled to weigh the evidence and make credibility determinations. Ashworth, supra. In other words, in ruling on a motion for new trial, a court is not required to construe the evidence in the manner most favorable to the government, which, of course, a court must do when ruling on a motion for judgment of acquittal. Nevertheless, a court should exercise its discretion and grant a new trial only in the extraordinary circumstances where the evidence preponderates heavily against the verdict. Id. In this regard, Judge Kozinski recently wrote for the Ninth Circuit:

> "If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury."

A. Lanoy Alston, 974 F.2d at 1211-12 (quoting, United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980)). Wheat's Conviction for drug Conspiracy is such a case.

In reality, that conviction rests upon two separate and distinct acts of money laundering which occurred during the ten-year life of the conspiracy. With respect to the money laundering incident which occurred in Florida in 1989, the testimony by Bulas and Steven Lewis ("Lewis"), the two witnesses who identified Wheat as having been present during that transaction, was that his participation in the transaction

was minimal. For instance, Lewis testified that Wheat did not appear to be participating in the discussion relating to how the Ferarri Testarossa would be paid for. See Doc. #573 at 9-10. In addition, Bulas testified that the gentleman accompanying Wheat (who Lewis identified as Stuart Norman) carried the money. See Doc. #572 at 153. While the testimony supports a finding that Wheat participated in an incident of money laundering, it takes a leap of imagination to conclude from that testimony that he was aware of and joined a wide ranging, decade-long conspiracy to distribute cocaine and heroin. With respect to the instance of money laundering which occurred in 1987, Wheat gave a plausible[10] explanation for why he deposited $50,000 in cash in his bank account at about the same time he loaned the same amount to Marzette. Moreover, if Wheat were truly part of the wide ranging conspiracy which the government charges him with being, it would have been more likely that he would have deposited the cash in his bank account in small amounts over an extended period of time and thus have avoided detection. As to Wheat storing Stuart Norman's Ferarri Testarossa in the garage of his funeral home, the evidence was that the funeral home had a large garage, capable of accommodating seven or eight vehicles. There was no indication that Wheat was forced to park one of his vehicles outside of the garage in order to store Norman's Ferarri Testarossa for a period of approximately one month. Moreover, the uncontroverted evidence is that Wheat and Stuart Norman had grown up together and had been friends since their childhood. That a person would let

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[10] By stating that the explanation is plausible, this Court is not making a value judgment that it is believable, only that it is neither bizarre nor frivolous.

a friend from his youth store an automobile owned by the friend (particularly an expensive one) in his garage, when storing the vehicle causes no inconvenience, hardly proves that the person storing the automobile knowingly and intentionally participated in a wide ranging, decade-long conspiracy to distribute cocaine and heroin. In addition, Wheat notarized the signature of Michael Watson on a document, by which the ownership of a 1964 E1 Camino was transferred. However, he did so at the request of Donald Pitts, his distant cousin. Doing a favor for a distant cousin does not demonstrate that the person doing the favor knowingly and intentionally participated in a wide ranging, decade long conspiracy to distribute cocaine and heroin. Finally, the Court has considered all of the evidence (the two incidents of money laundering, storing Stuart Norman's Ferarri Testarossa and notarizing the document by which ownership of the 1964 E1 Camino was transferred) in combination and not merely in discrete pieces. Nevertheless, this Court does not consider that evidence, when considered in combination, to establish that Wheat knowingly and voluntarily participated in a decade-long conspiracy whose purpose was the distribution of cocaine and heroin.

In sum, the standards which govern motions for judgment of acquittal under Rule 29 and motions for new trial under Rule 33 are different. Under the former, a court is obligated to construe the evidence in the manner most favorable to the government. Under the latter, a court may weigh the evidence and make credibility determinations. As Judge Kozinski noted in A. Lanoy Alston, supra motion for new trial may be properly granted even where there is sufficient evidence to sustain the conviction. The Sixth Circuit has said that such a motion is properly granted only in

extraordinary circumstances where the verdict is heavily against the preponderance of the evidence. Based upon its review of the evidence, this Court concludes that the verdict of guilty on the conspiracy charge is heavily against the preponderance of the evidence and that, therefore, exceptional circumstances warranting a new trial are present. In addition, in United States v. Todd, 920 F.2d 399, 406 (6th Cir. 1990), the Sixth Circuit noted that money laundering is an act which is integrally related to the success of a drug conspiracy; however, that court also noted that the government must demonstrate a "sufficient link" between the defendant's money laundering activity and the drug conspiracy in order to prove that the defendant was part of the conspiracy. When applying the rigorous standard which governs motions under Rule 29, this Court has concluded that the government met its burden of demonstrating the requisite link between the Defendant's conviction for money laundering arising out of the June, 1989, financial transaction in Florida, and the drug conspiracy, in order to prove that the Defendant was part of the conspiracy. However, when applying the less strict standard applicable to motions under Rule 33, this Court cannot conclude that the evidence introduced in this case, in addition to the incident of money laundering in Florida in 1989, for which the Defendant was convicted, demonstrates the existence of a "sufficient link" between that incident of money laundering and the drug conspiracy with which he was charged. Therefore, despite the fact that this Court has concluded that the Defendant's conviction for money laundering must stand (i.e., that he is not entitled to a judgment of acquittal or new trial on that offense), the Court, nevertheless, concludes that the Defendant is entitled to a new trial on the drug conspiracy count.

Accordingly, the Court sustains the Defendant's Motion for Judgment of Acquittal or, in the alternative, for New Trial (Doc. #462), to the extent that, with that motion, Defendant seeks a new trial on the conspiracy count.

Fourth, the Defendant argues that the government failed in its responsibility to provide exculpatory information under Brady v. Maryland, 372 U.S. 83 (1963), and to provide statements of witnesses under the Jencks Act, 18 U.S.C. § 3500. See Doc. #462 at 22-32. Brady imposes upon the government "an obligation 'to turn over evidence in its possession that is both favorable to the accused and material to guilt. . . .'" United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991) (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987)) (emphasis supplied by the Sixth Circuit). Under the Jencks Act, the government is required to produce statements of witnesses who testify. 18 U.S.C. § 3500. In ruling on this branch of the Defendant's motion, the Court will divide Wheat's argument relating to the asserted failure of the government to produce Brady/Jencks material into two parts, to wit: 1) the failure to produce statements of Bulas, Luis Del Pozo ("Del Pozo"), William Fernandez ("Fernandez"), Steven Lewis and Edward Oppenheimer ("Oppenheimer") and Agent Hall's notes from interviewing those witnesses; and 2) the alleged failure to produce the source of Agent Hall's Grand Jury testimony regarding the dates between which Roger Kendall ("Kendall") worked for Stuart Norman.

With respect Bulas and Lewis, both of whom testified, the Court cannot agree with the Defendant that the government violated either Brady or the Jencks Act. Not only did the government provide appropriate materials, but this

Court also conducted an in camera review of the materials which were withheld. Fernandez, who was the Finance Director for the Jaguar Collection, did not testify; therefore any statement he gave (or Hall's notes on same) cannot have been withheld in violation of the Jencks Act. Moreover, the evidence was that he was not present when the transaction occurred. Therefore, the Court fails to see how a statement by Fernandez (or Hall's notes regarding same) could qualify as Brady material. Del Pozo also did not testify; therefore, any statement he may have given or notes from an interview of him would not come within the Jencks Act. With respect to whether it would qualify as Brady material, this Court cannot say. Del Pozo was the salesman who sold the Ferarri Testarossa to Stuart Norman and Wheat. In addition, Del Pozo had sold a Jaguar to Wheat approximately one month before the transaction involving the Ferarri. Of those in Florida who could have identified Wheat, Del Pozo observed him for the longest period of time. If he was not able to identify Wheat as being present when the transaction involving the Ferarri occurred or if he said that Wheat was not present, that information would have been vital to Wheat's defense, which was based upon the proposition that he had not been in Florida in June, 1989. However, this Court has not had the opportunity to review a statement by or notes of an interview with Del Pozo; therefore, this Court cannot determine whether the statement or notes would qualify under Brady. Accordingly, the Court orders the government to submit to the Court, for an in camera review, any statement or notes relating to Del Pozo. After that review, the Court will rule on this branch of Wheat's motion with finality. Like Del Pozo, Oppenheimer, who notarized the signature of Howard Donaldson on a document in connection with the purchase of the Ferarri Testarossa, did not testify; therefore,

any statement by him would not come within the Jencks Act. As with Del Pozo, it is, however, not possible for the Court to determine whether any statement by Oppenheimer or notes of an interview with him constitute Brady material, since the Court has not reviewed those materials. Since Oppenheimer notarized a document for Howard Donaldson, who was identified as Stuart Norman during the trial, and since the evidence was that Norman and Wheat were together continuously while in Florida, a fair inference is that Oppenheim had the opportunity to view Wheat. Accordingly, the Court orders the government to submit to the Court, for an in camera review, any statement or notes relating to Oppenheimer. After that review, the Court will rule on this branch of Wheat's motion with finality. In sum, with respect to this aspect of the Defendant's motion the Court has concluded that there was no violation of the Jencks Act; that, with respect to Bulas, Lewis and Fernandez, there was no violation of Brady; and that, with respect to Del Pozo and Oppenheimer, the Court will not be able to determine whether there was a violation of Brady until it has conducted an in camera review of any statement or notes relating to those two.

The controversy over Agent Hall's Grand Jury testimony arises out of the difference between that testimony and Kendall's trial testimony. During the trial of this prosecution, Kendall testified that he had started working as a drug courier for Stuart Norman in 1984. See Doc. #396 at 8, 30. In addition, Kendall testified that he had ceased such work for Norman in 1986. Id. at 30. In his motion, the Defendant quotes extensively from Agent Hall's Grand Jury

testimony.[11] See Doc. #463 at 19-20. Agent Hall testified before the Grand Jury that he and agents employed by the FBI had interviewed Kendall on a number of occasions and that Stuart Norman had recruited Kendall as a drug courier sometime around 1986. Agent Hall also testified that Kendall was acting as a drug courier for Stuart Norman in October, 1988, when he (Kendall) went to New York City to buy approximately one and one-half kilograms of cocaine for Stuart Norman and was stopped by law enforcement officers in New Jersey. The Defendant argues that somewhere in the government's files there must be some report which indicates that Kendall told investigating officers that he was not recruited by Stuart Norman until 1986 and was continuing to act as a drug courier for him in 1988. The government argues that it would not have acted improperly if it had failed to provide Agent Hall's Grand Jury testimony to the Defendant under either Brady or the Jencks Act. However, according to the government, it did provide Agent Hall's Grand Jury testimony to the Defendant, whose real argument involves the timing of the disclosure rather than the fact of same. The government fails to grasp the Defendant's argument. The Defendant does not complain about the timing of the disclosure of Agent Hall's Grand Jury testimony or assert that same was not provided; rather, the Defendant contends that Agent Hall must have obtained the information which he

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[11] The Defendant has not appended a copy of Agent Hall's Grand Jury testimony to his motion, nor has he indicated that said testimony has been filed in this case. However, since the government does not question the accuracy of the quoted portions of that testimony, this Court will assume, for present purposes, that the quotations are accurate.

imparted to the Grand Jury regarding the years during which Kendall worked for Stuart Norman from some source and that the source of that information may be Brady or Jencks material. The government has not told this Court where Agent Hall obtained the information upon which he based his Grand Jury testimony;[12] therefore, the Court cannot determine whether the government violated its obligation under the Jencks Act or under Brady by failing to disclose same.[13]

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[12] Despite his testimony to the Grand Jury that he had interviewed Kendall, Hall testified during the trial, that he had spoken to that witness only in passing. See Doc. #576 at 163.

[13] Under Brady, the government must disclose only that information which is material. "Evidence is material 'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result would have been different.' . . . A reasonable probability is one 'sufficient to undermine confidence in the outcome.'" Phillip, 948 F.2d at 249 (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987)). See also, Kyles v. Whitley, 115 S.Ct. 1555 (1995). Under the Jencks Act, the defendant must show that he suffered prejudice as a result of the government's failure to produce material which it is required by that statute to produce. United States v. Susskind, 4 F.3d 1400 (6th Cir. 1993) (en banc). Whether the source of Hall's Grand Jury testimony is material under Brady or whether withholding it caused the Defendant to suffer prejudice under Jencks are questions which this Court will not decide in the abstract, without the benefit of having more information regarding the source of such testimony. There are, however persuasive arguments on both sides of these questions. With respect to the proposition that said information was not material and that withholding it did not cause the Defendant to suffer prejudice, Kendall's testimony did not

implicate Wheat in the slightest. Rather, that witness testified about the early days of the conspiracy, long before any evidence (or inference therefrom) linked Wheat to the conspiracy. Therefore, one could argue that, even if a statement or notes indicating that Kendall had previously said that he had been recruited in 1986 and had continued to work for Stuart Norman in 1988 was withheld from Wheat, the Defendant did not suffer any prejudice as a result. On the other side of the argument, there is the spillover effect Kendall's testimony may have had on Wheat's conviction for conspiracy, because that evidence helped convince the jury that Marzette was guilty of the same offense. Two incidents were most prominent in tying Wheat to the conspiracy, to wit: acts of money laundering in 1987 and 1989. The 1987 incident allegedly involved Marzette paying $50,000 in cash (an inference being that the cash was the proceeds of drug transactions) to Wheat, at about the same time he gave her a cashier's check in that amount (there was no direct evidence establishing the exact date that Marzette gave that sum to Wheat, although there was evidence that he deposited the $50,000 some three days after Marzette gave him the note). Therefore, the jury had to find that Marzette was a member of the conspiracy before the 1987 incident would have had persuasive value in linking Wheat to the conspiracy. In his testimony, Kendall directly linked Marzette to drugs, testifying that he had given her a quantity of cocaine in 1984, after he had stared working for Stuart Norman. If Kendall did not start working for Norman until 1986, as Hall testified to the Grand Jury, then the credibility of Kendall's testimony regarding the 1984 incident is called into question, and the jury might have disregarded vital testimony directly linking Marzette to drugs, which in turn could have cased it to conclude that Marzette was not guilty of the conspiracy charge. If Marzette were not part of the

Therefore, the Court will convene a conference call with counsel in order to establish further procedures leading to the resolution of this branch of the Defendant's motion.[14] At the

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conspiracy, then it might be difficult for the jury to see how the transaction between her and Wheat could have been money laundering. Under those circumstances, the jury would have been compelled to find that Wheat was part of the Conspiracy on the basis of only the 1989 incident of money laundering (as well as storing Stuart Norman's Ferarri Testarossa in his garage and notarizing a document at the request of his distant cousin Donald Pitts).

[14] In support of this branch of his motion, the Defendant relies heavily upon the decision by the Second Circuit in United States v. Wallach, 935 F.2d 445 (2d Cir. 1991). In Wallach, the court concluded that the defendant was entitled to a new trial, because his conviction rested in large measure on the testimony of a witness who perjured himself during the trial. The Defendant argues that Kendall must have perjured himself when he testified as to the dates between which he worked for Stuart Norman, since that testimony was contradicted by Hall's Grand Jury testimony. The government argues that Wallach is distinguishable from the present case is a question that this Court cannot answer at this time, since it does not know the source of Hall's Grand Jury testimony, if there was a source for that testimony. Indeed, the Court does not now possess sufficient information to determine whether Kendall perjured himself, whether Hall perjured himself of whether one or the other was simply mistaken.

In opposition to this branch of the Defendant's motion, the government argues that Hall's Grand Jury testimony would not have been admissible under an exception to the hearsay rule and

conclusion of this Decision, the Court sets forth certain options which could be pursued in order to resolve this issue; however, counsel should be prepared to offer their own suggestions on what procedures should be followed to resolve the question.

Accordingly, the Court overrules this branch of Wheat's motion, except for two areas, to wit: 1) whether any statements by or notes from interviews with Del Pozo and Oppenheimer qualify as Brady material (the Court has reserved ruling on those questions pending an in camera review); and 2) whether the government violated Brady and/or Jencks by not disclosing the source of Agent Hall's Grand Jury testimony (the Court has scheduled a conference

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that Rule 613 of the Federal Rules of Evidence would not authorize the Defendant to attempt to establish any statement Kendall may have made to Hall by extrinsic means. The government's argument with respect to Hall's Grand Jury testimony misses the point. The Defendant does not argue that the government's failure to produce that testimony violated Brady and/or Jencks; rather, he argues that the government was in violation because it failed to disclose the source of the discrepancy between Hall's Grand Jury testimony and Kendall's trial testimony. With respect to the question of whether the source of that discrepancy (if, indeed, there is such a source) would have been admissible in the Defendant's trial, this Court simply does not now have sufficient information presently before it to make that determination. The points to bear in mind are that, when Kendall testified in the manner in which he did, there was a discrepancy between his trial testimony and Hall's testimony before the Grand Jury and that the source of that discrepancy may be Brady material.

call with counsel in order to discuss procedures leading to the resolution of that issue).

Fifth, the Defendant argues that this Court should grant him a new trial, because he was denied due process when counsel for the government, Ralph Kohnen ("Kohnen"), was allowed, in the midst of his closing argument, to impose upon the jury his personal opinion that he had lied. During closing argument, Kohnen called Wheat and his Co-Defendant Marzette liars. Defendant argues that Kohnen, by calling the Defendants liars and accusing them of lying, interjected his personal belief that the Defendants had lied when they testified. Twice during closing argument, Kohnen inferred that Wheat, who had testified, had lied. See Doc. #581 at 67 ("I'll put it simply to you. Wheat had to lie."); Doc. #582 at 64 ("The United States feels strongly that the credibility of the Defendant Wheat . . . was destroyed by lies under oath to you . . . on the witness stand."). The Court overruled an objection to each statement. Id. Immediately preceding his second statement, Kohnen told the jury that the credibility of witnesses was always an issue for the jury to decide and that the jury had to decide what weight to give to each witness. Id. With that statement, Kohnen was merely repeating the instructions which the Court had given to the jury before closing arguments.

In United States v. Brown, 66 F.3d 124 (6th Cir. 1995), the Sixth Circuit set forth the test to be applied to claims of prosecutorial misconduct:

> This court's recent holding in United States v. Carroll, 26 F.3d 1380, 1384-90 (6th Cir. 1994), clarified the test to be applied to claims

> of prosecutorial misconduct. First, we determine whether the conduct was improper under United States v. Bess, 593 F.2d 749 (6th Cir. 1979). Improper conduct is then examined for flagrancy under United States v. Leon, 534 F.2d 667 (6th Cir. 1976). If the conduct is found not to be flagrant, we will reverse only when (1) the proof against the defendant was not overwhelming, (2) opposing counsel objected to the conduct, and (3) the district court failed to give a curative instruction.

Id. at 127. See also, United States v. Reliford, 58 F.3d 247, 250 (6th Cir. 1995). Accordingly, this Court turns to the initial inquiry, to wit: was Kohnen's argument improper.

The Court does agree with the Defendant that it is improper for a prosecutor to interject his or her personal belief as to the truth or falsity of a particular witnesses, testimony. See United States v. Young, 470 U.S. 1, 8 (1985); ABA Standards for Criminal Justice, Standard 3-5.8(b) ("It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any evidence. . . ."). Indeed, on a number of occasions, this Court sustained objections to Kohnen's closing argument, because he had expressed his opinion as to the truth or falsity of a particular witnesses' testimony and instructed the jury that the prosecutor's opinion as to whether a witness had told the truth was not relevant. See e.g., Doc. #581 at 51, 73-74; Doc. #582 at 52. However, this Court cannot agree with the Defendant that the two statements by Kohnen were expressions of his personal belief that he (the Defendant)

had lied during his testimony. Rather, Kohnen's statements merely requested the jury to draw an inference from evidence before it.[15] It cannot be questioned that a prosecutor is entitled to argue that the jury should draw a particular inference from the evidence (as opposed to the opposite inference). In United States v. Lanier, 33 F.3d 639, 659 (6th Cir. 1994), the Sixth Circuit said that a "prosecutor has reasonable latitude in fashioning his closing arguments, and in a case involving two essentially conflicting stories, it is reasonable to infer, and to argue, that one side is lying." Courts have held that a prosecutor does not interject his or her personal belief regarding a witnesses, credibility (i.e., he or she does not impermissibly vouch for the veracity of a witness) when phrases such as "I submit" are used. United States v. Necoechea, 986 F.2d 1273, 1279 (9th Cir. 1993). See also, United States v. Stulga, 584 F.2d 142, 147 (6th Cir. 1978) (use of phrase "I submit" is not equivalent to expressing personal belief that the defendant is guilty). With the first of his statements ("I'll put it simply to you. Wheat had to lie."), Kohnen used a phrase which is equivalent to "I submit." The word "submit" is a synonym for "contend" which is nothing more than an appeal to the jury to use their reasoning to draw the inference from the evidence that Wheat had lied. The second statement ("The United States feels strongly that the credibility of the Defendant Wheat . . . was destroyed by lies under oath to you . . . on the witness

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[15] This prosecution was a classic "swearing match" in which the Defendant, during his testimony, denied that he had done the acts of which other witnesses had accused him. The jury was required to resolve the question of whether the Defendant or the prosecution's witnesses were telling the truth

ENTERED BY ORDER OF THE COURT

/s/ _____

Leonard Green, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed March 7, 2000]

Nos. 96-3207

United States of America,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Wayne L. Wheat,	)
Defendant-Appellee.	)

BEFORE: KRUPANSKY, NELSON, and SILER, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

/s/
WALTER HERBERT RICE
UNITED STATES DISTRICT JUDGE

Copies to:

Richard Chema, Esq./Ralph Kohnen, Esq.
James R. Willis, Esq.
Gwendolyn R. Bowers, Esq.

ruling in part upon the Defendant's motion. The Court reserves ruling on the questions of whether statements by or notes from interviews with Del Pozo and Oppenheimer qualify as Brady material. The Court directs the Plaintiff to submit such materials to it, within 14 days of the entry of this decision, for an in camera review, after which it will rule on this aspect of the Defendant's motion with finality. The Court has also deferred ruling on the question of whether the government violated its obligation under Brady and/or the Jencks Act to provide him with the source of Agent Hall's grand jury testimony. Otherwise, the Court overrules that aspect of the Defendant's motion with which he seeks a new trial on the money laundering count.

The Court schedules a conference call for Thursday, January 18, 1995 at 4:30 p.m., for the purpose of discussing with counsel procedures which will lead to the resolution of this issue. The vital question to be resolved is where did Hall obtain the information which he imparted to the Grand Jury, regarding the dates between which Kendall worked for Stuart Norman. Since Hall testified that he only spoke with Kendall in passing, Hall's Grand Jury testimony, if not the product of mistake or perjury on the part of Hall or Kendall, must have come from some other source, i.e., a mistake by another agent or witness who interviewed Kendall. Counsel should be prepared to discuss the question of what process will allow the Court to discover whether the source of Agent Hall's Grand Jury testimony was Brady or Jencks material. The most apparent options are to resolve this issue with an evidentiary hearing, by affidavits or through some type of in camera proceeding.

the power of a party to produce merely because that party extensively interviews that witness. In addition, Wheat did not present evidence demonstrating that he could not subpoena either Del Pozo or Fernandez.

Accordingly, the Court overrules the branch of Wheat's motion in which he argues that he is entitled to a new trial, because this Court refused to give a missing witness instruction.

Ninth, Wheat argues that he is entitled to a new trial because of this Court's instruction that the money laundering offense for which Wheat was convicted occurred "on or about June 15, 1989." See Doc. #462 at 2. Wheat does not brief this asserted basis for a new trial. The Court and counsel discussed this question at length during the charge conference conducted during Wheat's trial. For reasons which the Court set forth upon the record at that time, this Court overrules this branch of Wheat's motion.

Based upon all of the foregoing, the Court sustains in part, overrules in part and reserves ruling in part upon Wheat's Motion for Judgment of Acquittal or, in the alternative, for a New Trial (Doc. #462). To the extent that, with that motion, the Defendant seeks a judgment of acquittal, the Court overrules that motion in its entirety. To the extent that, with that motion, the Defendant requests a new trial on the charge of conspiracy, (Count 1 of the indictment), the Court sustains the Defendant's motion. The conviction on the conspiracy count is vacated and a new trial on that charge is ordered. To the extent that, with that motion, the Defendant seeks a new trial on the charge of money laundering (Count 9 of the indictment), the Court overrules in part and reserves

> would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability. Obviously, the potential situations are too numerous and varied to make possible a comprehensive and definitive enumeration. The trial judge, using his sound discretion, must determine the sufficiency of the relationship by ascertaining the practical effect of any connection between the prospective witness and the party against whom the inference is sought to be used as well as the materiality of the witness' testimony.
>
> Id. at 195-96 n. 4.

Id. at 765. See also, United States v. Myerson, 18 F.3d 153 (2d Cir. 1994); United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993).

Herein, Wheat argues only that the two were "extensively interviewed" by the government. See Doc. #462 at 42. Wheat has not presented any other evidence tending to demonstrate that Del Pozo and Fernandez were "peculiarly within the power of the government to produce." Accepting for present purposes that Del Pozo and Fernandez were extensively interviewed by the United States, this Court cannot accept the premise that a witness is peculiarly within

Defendants argue that the court erred by refusing to give jury instructions concerning the prosecution's failure to call certain witnesses, particularly George Clark, Jr., CEO of the bank. They claim that Clark was "peculiarly within the power" of the prosecution and that his testimony would have "elucidated" the transaction at issue. No evidence showed that defendants could not have subpoenaed Mr. Clark.

Fulfillment of a two-part test is necessary before an adverse inference can be drawn from the failure of a party to call a witness: 1) the witness must be "peculiarly within [the opposing party's] power to produce," and 2) the witness' testimony would "elucidate the transaction." United States v. Blakemore, 489 F.2d 193, 195 (6th Cir. 1973). Both elements must be present and the analysis must be "strictly applied." Id.

Establishing the first element depends not only on a witness' physical availability but also on his relationship to the party in the suit.

> [P]racticality is the touchstone in this situation. There may be a relationship of such description (legal, personal, practical or perhaps even social) between a prospective witness and one party that

offense), this court will follow the analytical framework established by the Sixth Circuit therein.[21] Herein, Wheat has not presented any evidence that the prosecutor acted as a rubber stamp.[22] Moreover, he does not argue that the decision to charge him with two offenses was based upon his race, sex, religion or exercise of his constitutional rights. Accordingly, this Court concludes that the Defendant was not denied due process by the decision to charge him with both money laundering and conspiracy to distribute drugs.

Eighth, Wheat argues that he is entitled to a new trial, because this Court erred by failing to give a "missing witness" instruction. Wheat focuses upon the failure of the government to call Del Pozo, the salesman who sold the Ferarri Testarossa, and William Fernandez, the Finance Manager at the Jaguar Collection.[23] In United States v. Frost, 914 F. 2d 756 (6th Cir. 1990), the Sixth Circuit discussed the Standards which govern the exercise of discretion when a "missing witness" instruction is requested:

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[21] Both Wheat and the government rely upon cases decided in the context of a decision to prosecute a defendant in federal rather than in state court.

[22] In Davis, the Sixth Circuit said that it was incumbent upon a defendant to present evidence establishing that the prosecutor acted as a rubber stamp. 15 F.3d at 530.

[23] Oppenheimer, who had the opportunity to observe Wheat in Florida, was also not called as a witness by the government. However, the Defendant does not argue that he was entitled to a missing witness instruction, because the government failed to call that potential witness.

court did not exist and that, therefore, a case could be referred for an improper purpose.[20] On appeal, the Tenth Circuit reversed, concluding that the absence of objective criteria was not a violation of due process. 963 F.2d at 1342. The fact that the Tenth Circuit reversed the district court's decision in Williams destroys the value of that decision as precedent. Moreover, in United States v. Allen, 954 F.2d 1160 (6th Cir. 1992), the Sixth Circuit, in a decision rendered before the Tenth Circuit issued its decision in Williams, also rejected the analysis of the District Court. In Allen, the Sixth Circuit held that as long as the decision to prosecute a defendant in federal rather than in state court was not based upon the defendant's race, sex, religion, or exercise of constitutional rights and the prosecutor did not act as a rubber stamp, due process does not require that a policy govern the decision of where a defendant is prosecuted. Id. at 1165-66. See also, United States v. Batchelder, 442 U.S. 114 (1978); United States v. Davis, 15 F.3d 526, 528-30 (6th Cir 1994); United States v. Oakes, 11 F.3d 897, 899 n. 1 (9th Cir. 1993) (noting that the circuits have, with near uniformity, concluded that prosecutorial discretion is unbridled, absent a showing of discrimination on the basis of suspect characteristics such as race, sex, religion or personal beliefs). Although the Sixth Circuit's decision in Allen is not directly on point (that case involved the decision to prosecute a defendant in federal rather than in state court and not the decision to charge a defendant with two federal offenses rather than only one such

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[20] As a remedy for this violation of due process, the District Court concluded that it would not follow the mandatory minimum sentence provided by Title 21 of the United States Code or the Sentencing Guidelines

Seventh,[18] the Defendant argues that, even if a particular criminal act could be prosecuted as a violation of two separate and distinct criminal statutes (herein, conspiracy to distribute drugs, 21 U.S.C. § 846, and money laundering, 18 U.S.C. § 1956), the decision to prosecute him for the more serious charges must accommodate certain due process protections afforded those accused, so as to avoid what would otherwise be de facto sentencing by the IRS, the FBI and/or the prosecution, which, according to the Defendant, occurred in this case.[19] See Doc. #462 at 38-41. The Court cannot agree with the Defendant that he was denied due process by the decision to charge him with both money laundering and conspiracy to distribute drugs. In support of this contention, Wheat places primary reliance upon United States v. Williams, 746 F.Supp. 1076 (D.Utah 1990), reversed, 963 F.2d 1337 (10th Cir. 1992). In Williams, the defendants were convicted of offenses relating to the possession and distribution of crack cocaine. After their conviction, the defendants requested that the District Court depart downward from the sentences recommended in the presentence investigations, arguing that they had been denied due process because they had been prosecuted in federal rather than in state court. The District Court agreed with the defendants, concluding that their due process rights had been violated, because an objective policy governing the decision of when to refer a case to federal prosecutors for prosecution in federal

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[18] The sixth branch of the Defendant's motion is discussed, above, in connection with the third branch of said motion.

[19] Wheat concedes that his argument is somewhat novel. See Doc. #462 at 38.

inter alia, the Court fails to give a curative instruction. Although it did not so instruct the jury when these particular statements were made, the Court instructed the jury, on three other occasions, that Kohnen's belief about the credibility of a witness was not relevant. In addition, the Court instructed the jury (prior to, as well as after the closing arguments) that closing arguments of counsel are not evidence.

Accordingly, this Court concludes that the Defendant is not entitled to a new trial because the prosecutor, during closing argument, told the jury that he had lied.

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(1) the tendency of the comments to mislead the jury or prejudice the defendant, (2) whether the comments were isolated or extensive, and (3) whether the comments were made deliberately." 66 F.3d at 128. Herein, Kohnen's statements if construed as being his personal belief, could not have misled the jury or prejudiced the Defendant, since this Court informed the jury on three occasions that Kohnen's personal belief was irrelevant. While the Court cannot find that they were isolated (since the Court was required to sustain three objections during closing argument when Kohnen improperly interjected his personal belief as the truthfulness of a particular witnesses' testimony), the Court does not find that the statements were made deliberately; rather, they were inadvertent slips, which this Court is confident, as the prosecutor gains in experience and confidence, will not again be repeated in its courtroom. Accordingly, Kohnen's statements did not constitute flagrant misconduct.

testimony) that Wheat had lied. In this context, Kohnen used "feels" as a synonym for "submits" or "contends." In other words, Kohnen was appealing to the jury's reasoning and not stating his personal belief. Accordingly, this Court concludes that Kohnen's two statements did not constitute "improper conduct," the first step in the analytical framework set forth by the Sixth Circuit in Brown.[16]

Even if the Court were to construe Kohnen's statements as being his personal belief that the Defendant had lied (a construction which the Court does not adopt) and that, therefore, his statements constituted improper conduct, the Defendant would not be entitled to a new trial. In the absence of flagrant misconduct,[17] a new trial is warranted only when,

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[16] In Brown, the Sixth Circuit said that the question of whether conduct is improper is to be determined in accordance with United States v. Bess, 593 F.2d 749 (6th Cir. 1979). 66 F.3d at 127. Contrasting the prosecutor's closing argument in Bess (which was found to be improper conduct) with Kohnen's statements herein lends support to this Court's conclusion that Kohnen's closing argument did not constitute improper conduct. In Bess, the prosecutor, during the opening portion of his final argument, told the jury that the United States would not have brought the charges against the Defendant if it did not believe that he was guilty of them. During the closing phase of argument, the prosecutor told the jury that he believed beyond a reasonable doubt that the defendant was guilty.

[17] In Brown, the Sixth Circuit indicated that three factors should be considered when determining whether a prosecutor's statements constitute flagrant misconduct, to wit: "factors to consider when determining flagrancy of prosecutorial comments:

stand.") presents a closer question. One could argue that, by using the phrase "[t]he United States feels," Kohnen was stating his personal belief that the Defendant had lied. However, Kohnen's argument must be considered in the context in which it was made. Immediately, preceding the quoted phrase, Kohnen made the following argument to the jury:

> Now, as I said yesterday, and I think I've stressed with you today, witness credibility is always an issue. And, of course, it's your job to give whatever weight you decide to each witness's testimony.
>
> Now, while you're doing that, or before you do that, we would like you to consider who, of all the witnesses in this trial, had the most incentive to lie? I mean there are going to be instances during your deliberations when you either believe one of our witnesses or you believe the story of Defendant Wheat or Defendant Marzette.
>
> Now, you heard Wheat's testimony, and you heard Marzette's testimony. Can you honestly believe, after all of the evidence in this case, that the Defendants didn't commit the crimes with which they are charged?

Doc. #582 at 64.

Considering the challenged comment of Kohnen in the above context, this Court is firmly convinced that the jury understood that comment as an argument that it should infer from the evidence presented (including Wheat's own